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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of CARL MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of ANN B. MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Guardians of DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER and FRANK MCFATHER, as next friends for DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER, FRANK MCFATHER, PENNY MCFATHER, JILL MCFATHER, JEFF MCFATHER, DANIEL MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER,

Appellants,

v.

COTTON STATES MUTUAL INSURANCE COMPANY,

Appellee.

On Appeal From The Supreme Court Of Georgia And/Or Petition For Writ Of Certiorari

JURISDICTIONAL STATEMENT — STATE CIVIL CASE

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QUESTIONS PRESENTED

1.

Did the Supreme Court of Georgia deny to McFather, et al., Appellant-Plaintiffs, the protection guaranteed to them by the Due Process Clause, Section 1, of the Fourteenth Amendment to the Constitution of the United States by its action and ruling in failing and refusing to affirm the entire judgment of the trial court but rather remanding part of the case to the trial judge to resolve the issue of whether or not Cotton States had tendered policy benefits to McFather, et al., within thirty days of March 23, 1983 (almost nine months after the final judgment of the trial court in favor of McFather, et al., on all issues, on July 7, 1982) under these circumstances:

A. There is nothing in the transcript or the record relating to the alleged tender, a jurisdictional requirement for the Supreme Court of Georgia.

B. The alleged tender was not an issue in the trial of the case in the court below, the Superior Court of Randolph County, Georgia.

C. The alleged tender was not mentioned in the enumeration of errors of Appellee-Defendant, Cotton States, a statutory jurisdictional requirement in Georgia.

D. The alleged tender issue did not involve the review of a question of law from a superior court or a constitutional city court, which is the definition of the statutory and constitutional jurisdiction of the Supreme Court of Georgia.

E. The Supreme Court of Georgia literally rewrote the Georgia "no fault" statute (O.C.G.A. Sec. 33-34-6, Sec. 56-3406b, Ga. Code of 1933, as amended) by eliminating the statutory requirement of measuring thirty and/or sixty days from the failure of the insurer to pay after demand is made in order to establish liability for penalty, attorneys' fees and punitive damages, and substituting a concept created by the Court out of the whole cloth—that is, measuring the 30/60 day periods from the time the Court had made the law clear on March 23, 1983, in *Flewellen* v. *Atlanta Casualty Company*, 250 Ga. 709, 300 SE2d 673 (Appendix A2), although the Court, in that

very case, had held that the mandate of the law had already been clear; said, in response to a contention ". . . that the statute is unconstitutionally vague, violating due process, in that 'men of common intelligence must necessarily guess at its meaning and differ as to its application' " (p. 712),: "We are unable to discern an ambiguity and hold that the terms are sufficiently definite and certain in meaning to give proper guidance to those bound by its terms"; and pointed out (714): "The law had been in effect since 1975, Ga. L. 1974, p. 113, and the *insurer proceeded at its own risk* in failing to comply with the statute when issuing this policy in 1979." (Emphasis added)

2.

In addition, under its pendent jurisdiction, this Court is asked to consider the following question:

Did the Supreme Court of Georgia deny to McFather, et al., Appellant-Plaintiffs, the protection guaranteed to them by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and/or did the Supreme Court of Georgia err under Georgia law by its action and ruling in holding the 30-day period and the 60-day period relating to the sanctions of penalties, attorneys fees and punitive damages provided and clearly stated under O.C.G.A. § 33-34-6 (former Code Section 56-3406(b) of the Georgia Code of 1933, as amended) was not applicable to claims against "no-fault" insurance carriers under O.C.G.A. § 33-34, but that, retroactively, in lieu of said statute, the effective date of *Flewellen* v. *Atlanta Casualty Company*, 250 Ga. 709, 300 SE2d 673, on March 23, 1983, is the date of clarity from which said 30 and 60 day periods should be calculated, whereas, *Flewellen* itself held that said statute was a clear mandate from the date of its enactment by the Georgia General Assembly in 1974?

Retroactive application of *Flewellen* as the date of clarity denies to the McFathers the equal protection of the law guaranteed to them by the equal protection clause of the 14th Amendment to the Constitution of the United States, Section

1, in that policyholders who settled or tried their cases before *Flewellen* had their cases adjudicated on the basis of denial in 30/60 days from demand, instead of, as with the McFathers, in 30/60 days from March 23, 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ___

BEN MCFATHER, *et al.*,

Appellants,

v.

COTTON STATES MUTUAL INSURANCE COMPANY,

Appellee.

On Appeal From The Supreme Court Of Georgia And/Or Petition For Writ Of Certiorari

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JURISDICTIONAL STATEMENT — STATE CIVIL CASE

JURISDICTIONAL STATEMENT

Ben H. McFather, et al., were Plaintiffs in the trial court, Appellees in the Georgia Supreme Court, and are Appellants in the United States Supreme Court. They will be referred to as Appellants/Plaintiffs or the McFathers.

Cotton States Mutual Insurance Company was Defendant in the trial court, Appellant in the Georgia Supreme Court, and is Appellee in the United States Supreme Court. It will be referred to as Appellee/Defendant or as Cotton States.

28 U.S.C.A. Sec. 2403(b) may be applicable and this pleading has been served upon Honorable Michael Bowers, the Attorney General, State of Georgia. (Page 33)

N.1: Just published February 23, 1984, 251 Ga. 739 (no. S.E. cite)

Appellants, Ben McFather, et al. (Appellees-Plaintiffs in the courts below), appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Georgia affirming a verdict and judgment of the Superior Court of Randolph County, Georgia, in favor of McFather, et al., Appellees in the Supreme Court of Georgia and Plaintiffs in the Superior Court, ordering and adjudging that McFather, et al., Appellees, as Plaintiffs, recover from Cotton States Mutual Insurance Company, Appellant in the Georgia Supreme Court and Defendant in the Superior Court, in the amount of $286,500.00, and the costs of action, but then remanding the case to the trial judge for fact finding on an issue which is not in the record. In the event this Court does not find jurisdiction with respect to this Appeal, Appellants, in the alternative, move this Court to consider this Appeal as their Petition for the Writ of Certiorari.

OPINIONS BELOW

The Opinion or Order of the Supreme Court of Georgia dated and entered on December 5, 1983 (Appendix A, p. 1a) and the Opinion or Order including the denial of Appellants' motion for rehearing dated and entered on December 20, 1983 (Appendix B, p. 9a), and the Opinion and Order including the denial of Appellants' motion for reconsideration (or second motion for rehearing) dated and entered January 18, 1984 (Appendix C, p. 10a), are not yet reported. The verdict and judgment of the Superior Court of Randolph County, Georgia will not be reported and are a part of the record below (T. 227-229).

JURISDICTION

The opinion of the Supreme Court of Georgia was entered December 5, 1983; Appellants' motion to the Supreme Court of Georgia for rehearing was denied December 20, 1983, and their motion for reconsideration (or their second motion for rehearing) was denied January 18, 1984. Notice of appeal to this Court was timely filed on March 2, 1984, in the office of the Clerk of the Supreme Court of Georgia.

The question which these Appellants seek to raise in this Court, the denial of due process of law guaranteed by Amendment XIV of the Constitution of the United States, was raised for the first time in a motion for rehearing (characterized as a motion for reconsideration) (denied by the Supreme Court of Georgia January 20, 1984). This constitutional question could not be raised sooner because the denial of such due process resulted from the action of the Supreme Court of Georgia itself, without jurisdiction of the subject matter, in entering and filing its order and opinion of December 5, 1983. Thus, Appellants could not have taken action sooner because the earliest ruling took place in the Supreme Court of Georgia on December 5, 1983. The Supreme Court of Georgia passed upon this question by denying the aforesaid motion for rehearing.

Jurisdiction of this Court is invoked under 28 USCA, Section 1257(2) in connection with this Appeal and under 28 USCA, Sections 1257(3) and 2103 in the event that an Appeal is not applicable and the Writ of Certiorari is required. This action for benefits, penalty, attorneys' fees and punitive damages draws in question the Georgia "no fault" insurance law, O.C.G.A. Chapter 34 (Ga. Laws 1974, pp. 113, et seq., and Ga. Laws 1975, pp. 1202, et seq.) and, in particular, O.C.G.A. Sec. 33-34-6(b) and (c) (former Code Sec. 56-3406b (b) and (c), Ga. Code of 1933, as amended), as said statute was construed and applied by the Supreme Court of Georgia in the above-stated case, on the grounds that the construction and application of said State statute is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Cox Broadcasting Corp.* v. *Cohn*, 43 L.Ed.2d 328, 420 U.S. 469, 95 S.Ct. 1029 (1975); *National Socialist Party* v. *Village of Skokie*, 53 L.Ed.2d 96, at p. 98, 432 U.S. 43, 97 S.Ct. 2205 (1977); *Flynt* v. *Ohio*, 68 L.Ed.2d 489, at p. 491, 451 U.S. 619, 101 S.Ct. 1958 (1981); *Minnick* v. *California Dept. of Corrections*, 68 L.Ed.2d 706, at p. 718, 452 U.S. 105, 101 S.Ct. 2211 (1981); and *American Export Lines, Inc.* v. *Alvez*, 64 L.Ed. 2d 284, at p. 288, 446 U.S. 274, 100 S.Ct. 1673 (1980).

STATUTE INVOLVED

O.C.G.A. Sec. 33-34-6 (b, c) (former Code Sec. 56-3406b, Ga. Code of 1933, as amended):

> "33-34-6. Payment of benefits by insurers generally; proceedings upon failure or refusal of insurers to pay benefits.
>
> "(a) Payment of benefits required by this chapter must be made periodically on a monthly basis as expenses are incurred or, in the case of total disability, as disability continues.
>
> "(b) Benefits required to be paid without regard to fault shall be payable monthly as loss accrues. The benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the fact and the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail to the last known address in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery. Basic no fault payments may be paid by the insurer directly to persons or firms supplying necessary products, services, or accommodations to the claimant. In the event the insurer fails to pay each benefit when due, the person entitled to the benefits may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25 percent of the amount due and reasonable attorney's fees.
>
> "(c) In addition to all other penalties provided for in this Code section, in the event that an insurer fails or refuses to pay a person the benefits which the person is entitled to under this chapter within 60 days after proper proof of loss has been filed, the person may bring an action to recover the benefits; and, if the insurer fails to prove

that its failure or refusal to pay the benefits was in good faith, the insurer shall be subject to punitive damages. (Ga. L. 1974, p. 113, § 6; Ga. L. 1975, p. 1202, § 5.)"

Constitution of the United States—Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

In 1974, the Georgia General Assembly enacted, and later amended, a "no fault" automobile accident law entitled "Georgia Motor Vehicle Reparation Act" (Ga. Acts 1974, p. 113 et seq.) O.C.G.A. Sec. 33-34-1, et seq. (former Code Sec. 56-3401b, et seq.). The significant parts of it are included herein under the caption "Statute" (p. 4).

This law requires that each driver carry a minimum of $5,000.00 of "no fault" insurance. It also requires that an insurance company writing a "no fault" policy must offer a coverage of up to $50,000.00 per person.

In *Jones* v. *State Farm Mutual Automobile Insurance Co.*, 156 Ga. App. 230, 274 SE2d 623, the Georgia Court of Appeals upheld the statute, holding that there was ". . . an evidentiary burden upon no fault insurers to demonstrate that optional coverages were expressly offered to, and knowingly accepted or rejected in writing by, each of the applicants for no fault insurance." (p. 233).

The Georgia Supreme Court granted certiorari and later dismissed it July 7, 1981.

Appellants, Ben McFather and Frank McFather, as Administrators of the estate of Carl McFather and Ann McFather, and Ben McFather and Frank McFather, as Guardians for the

minor children of Carl McFather and Ann McFather, et al., as Plaintiffs, filed suit in the Superior Court of Randolph County, Georgia, against Cotton States Mutual Insurance Company, Appellee, hereinafter Defendant-Appellee, and Cotton States, seeking recovery of personal injury protection benefits pursuant to O.C.G.A. 33-34-5 (former Code Anno. § 56-3404b), as well as statutory penalties, attorney's fees and punitive damages pursuant to O.C.G.A. 33-34-6 (former Code Anno. § 56-3406b), for nonpayment of optional benefits within 30/60 days of demand (R. 3-9).

Defendant filed its answer and forty (40) defenses denying any liability for any benefits (R. 10-24). Plaintiffs filed a motion to amend their pleadings so as to add all of the children of Carl and Ann McFather, deceased, as parties Plaintiff (R. 139-149). The Court granted Plaintiffs' motion to amend (R. 152-153).

The case came on for trial on June 28, 1982. A brief of the evidence is attached as Appendix E and an outline of events in sequence is attached as Appendix F.

On June 30, 1982, the jury returned a verdict for the Plaintiffs and against the Defendant in the sum of Ninety Thousand Dollars ($90,000.00) as optional benefits, Twenty-two Thousand Five Hundred Dollars ($22,500.00) as statutory penalties, Thirty-six Thousand Dollars ($36,000.00) as attorney's fees, and One Hundred Thirty-eight Thousand Dollars ($138,000.00) as punitive damages (R. 227). Judgment on the verdict was entered on July 7, 1982 (R. 228-229). Defendant filed a motion for new trial or in the alternative, judgment notwithstanding the verdict (R. 230). The trial court entered its order overruling Defendant's motion on April 30, 1983 (R. 252). Defendant filed a notice of appeal on April 10, 1983 (R. 1) to the Supreme Court of Georgia. The Georgia Supreme Court, on December 5, 1983, entered an order and opinion (Appendix 1(a)) affirming the case, but remanding it to the Judge of the Superior Court of Randolph County, Georgia, to resolve the issue of whether or not Cotton States Insurance Company, Appellee, had tendered policy benefits to McFather, et al., within 30 days of

March 23, 1983, a date almost nine months (259 days) after the final judgment of the trial court in favor of McFather, et al., on all issues, on July 7, 1982. McFather, et al., filed a motion for rehearing which was denied on December 20, 1983 (Appendix 1(b)), and a motion for reconsideration (or second motion for rehearing), which was denied January 18, 1984 (Appendix 1(c)). This timely appeal and/or application for certiorari followed.

In the case at bar, Cotton States issued a policy for only $5,000.00 in "no fault" coverage and failed to comply with the provisions of the statute requiring the offer of additional coverage. Upon the death of Carl McFather and Ann McFather, Cotton States paid $5,000.00 apiece in "no fault" coverages and refused to pay the additional $45,000.00 apiece, the so-called "optional benefits." The Appellants-Plaintiffs sued for these benefits (as well as penalties, attorney's fees, and punitive damages, all of which are provided by statute in case the insurance company fails to pay within 60 days after demand) and the trial judge directed a verdict for Appellant-Plaintiffs for these optional benefits in the amount of $90,000.00.

The Georgia Supreme Court held that "the trial court did not err in . . . granting the McFather's motion for directed verdict that they were entitled as a matter of law to optional PIP benefits." (p. 6)

JURISDICTION OF THE GEORGIA SUPREME COURT

Our arguments on the constitutional questions are aimed at O.C.G.A. § 33-34-6 (former Code § 56-3406(b) Georgia Code of 1933, as amended), as construed by the Supreme Court of Georgia in the case at bar, and upon the rulings and decisions of the Supreme Court of Georgia in the case at bar. We necessarily look to the Constitution and law of Georgia to determine the jurisdiction of the Georgia Supreme Court.

This is the only case—at least, the only case in Georgia—in which an appellate court, without sustaining any challenged

ruling of the trial court, nevertheless, remanded the case for further proceedings in the court below.

It is beyond question that the Supreme Court of Georgia is a court the jurisdiction of which is strictly limited to the correction of errors of law arising in the superior courts and certain constitutional city courts, that is, a court of appellate jurisdiction. These jurisdictional requirements are set forth in Article VI, Section VI, Paragraph II, of the Constitution of the State of Georgia of 1982 (Ga. Code § 2-3202); Article VI, Section VI, Paragraph III, of the Constitution of the State of Georgia of 1982 (Ga. Code § 2-3203); and O.C.G.A. § 5-6-34. The so-called tender question did not emanate from a court at all and it certainly did not involve a legal ruling.

This is a case in which the Georgia Supreme Court reached its decision on allegations not included in the transcript or the record, but appearing for the first time in the appellate brief of Cotton States.

The Supreme Court of Georgia has no original jurisdiction,

> "1. The Supreme Court is a court for the trial and correction of errors of law *committed in the trial courts, as shown by the record of what transpired therein which has been transmitted to it. This court has no original jurisdiction, and it cannot decide questions raised for the first time after the case has been appealed to it.* Constitution of the State of Georgia, Art. VI, Sec. II, Par. IV (Code Ann. § 2-3704); Velkey v. Grimes, 214 Ga. 420 (105 SE2d 224); Abrams v. State, 223 Ga. 216, 225 (154 SE2d 443); Moore v. Hanson, 224 Ga. 482 (3) (162 SE2d 429); Bonner v. Smith, 226 Ga. 250 (2) (174 SE2d 438)." *Kitchens* v. *The State*, 228 Ga. 624 (1), at p. 625, 187 SE2d 268. (Emphasis added)
>
> "Lumpkin, J. (After stating the facts.) 1. *This court has no original jurisdiction, but is a court alone for the trial and correction of errors.* Constitution, Article 6, Section 2, Paragraph 5, Civil Code, § 5836. So far as material to the present case, the Supreme Court is declared to have authority, 'To exercise appellate jurisdiction, and that only, and in no case to hear facts or examine witnesses . . .

> To grant any writ necessary to carry out any purpose of its organization, or to compel any inferior tribunal or officers thereof to obey its order . . . To punish for contempt . . .' (Civil Code § 5498.) It is in no respect a court of first instance." *Vanderford* v. *Brand*, 126 Ga. 67 (1), at p. 68, 54 SE 822. (Emphasis added)

See, also, the following:

> *Johnson* v. *Lancaster*, 5 Ga. 39, at p. 48 (no SE cite);
>
> *Republic of Cuba* v. *Arcade Building of Savannah, Inc.*, 104 Ga. App. 848 (1), at p. 851, 123 SE2d 453;
>
> *Modlin* v. *Smith*, 13 Ga. App. 259 (1), at p. 260, 79 SE 82.

This is a case in which the Georgia Supreme Court, after affirming the rulings of the trial court, exceeded its constitutional jurisdiction by remanding the case, without sustaining any challenged ruling of the trial judge, on a basis other than review of a legal ruling emanating from a superior or constitutional city court of the State of Georgia. There was no legal ruling below, nor did the controversy emanate from a court.

This is a case in which the Georgia Supreme Court overlooked or failed to apply the statute providing for an enumeration of errors and numerous cases of the Georgia Supreme Court which hold that the *Supreme Court of Georgia is foreclosed from ruling on questions not contained in the enumeration of errors.* (See brief of Cotton States as appellant in the Supreme Court of Georgia (certificate of service dated June 30, 1983), pages 6-7, which single sentence constituted the only "factual" information before the Court.)

> "Bell, Presiding Judge. Appellant enumerated error on several grounds, but argued none of them. Thus, they were abandoned. Ocmulgee Electric Membership Corp. v. Taylor & Sons, Inc., 115 Ga. App. 44 (5) (153 SE2d 666); Bass v. State, 115 Ga. App. 461 (3) (154 SE2d 770); Zappa v. Higgins, 116 Ga. App. 81 (3) (156 SE2d 521). *Appellant did argue, but did not set forth in his enumeration*, that the finding of the court, which heard the case without the intervention of a jury, was not authorized by the evidence.

> *Under Sec. 14 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended by Ga. L. 1965, pp. 240, 243; Code Ann. § 6-810), this court has no jurisdiction to consider grounds which though argued are not enumerated according to that section."* Calhoun v. *Patrick*, 116 Ga. App. 303, 157 SE2d 31. (Emphasis added)
>
> "4. It is argued in the brief for the plaintiff in error that the verdict did not authorize the grant of the permanent injunction for which the plaintiffs prayed, and the decree granting such relief is for that reason void. *This question was not raised in the trial court by any prescribed mode of procedure.* There is *no exception to that decree* upon this ground, and *it is well settled that the Supreme Court has no jurisdiction to pass upon questions not made in the record.* See Sanders Mfg. Co. v. Dollar Savings Bank, 110 Ga. 559 (35 S.E. 777); Brooks v. Raiden, 113 Ga. 86 (2) (38 S.E. 409); Gabbett v. City of Atlanta, 137 Ga. 180 (4) (73 S.E. 372); Bailey v. Warlick, 196 Ga. 642 (1) (27 S.E.2d 322); Code § 6-1607." *Rushing* v. *Akins*, 210 Ga. 450 (4), at p. 452-453, 80 SE2d 813. (Emphasis added)

In this connection, see, also, the following:

> *Sanders Mfg. Co.* v. *Dollar Savings Bank*, 110 Ga. 559 (1), 35 SE 777;
>
> *The Board of Education of Glynn County* v. *The Mayor, etc. of Brunswick, et al.*, 72 Ga. 353 (1), at 355, (none);
>
> *West* v. *Life Insurance Company of Virginia*, 142 Ga. App. 877 (2), at p. 879, 237 SE2d 239;
>
> *Gabbett* v. *City of Atlanta*, 137 Ga. 180 (4), at 184, 73 SE 372;
>
> *Brooks* v. *Raiden*, 113 Ga. 86 (1), 38 SE 409.

The Supreme Court of Georgia also denied due process to the McFathers by taking the clear and unambiguous language of a statute (O.C.G.A. § 33-34-6, former Ga. Code § 56-3406(b)) and "construing" it to mean something entirely different from the clear words of the statute that the 30/60 day periods ran from the time the insurer received reasonable proof of the claim, when it was the clear duty of the Court to *apply* the unambiguous statute, *not to construe it.* This action of the

Court was unreasonable, arbitrary and, particularly as applied to the Plaintiff's vested property rights and legally protected interest in the verdict and judgment dated July 7, 1982, it was *confiscatory and retroactive.*

There may be arguments about many contentions of denial of due process, but there is one contention as to which there can be no doubt—*a decision by a court is a denial of due process if the court has no jurisdiction.*

The Constitution of the State of Georgia clearly defines the jurisdiction of the Supreme Court of Georgia. That jurisdiction is to review and correct errors of law from the superior courts and certain constitutional city courts of the State of Georgia.

It has been repeatedly held by the Georgia Supreme Court that state action, (in this instance the action of the Supreme Court of Georgia in its construction of the Georgia "no fault" law (O.C.G.A. 33-34-6)), without jurisdiction is a denial of the due process of law which is guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Both Federal and Georgia courts have repeatedly held that jurisdiction is essential to due process:

> "3. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." *Scott* v. *McNeal*, 38 L.Ed. 896 (3) (1894), 154 U.S. 34, 14 S.Ct. 1108.
>
> "Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law." *Pennoyer* v. *Neff*, 24 L.Ed. 565, at p. 572, 95 U.S. 679, 714 F.C. No. 10083 (1978).

Pennoyer has been eroded, but not on this proposition.

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment,

and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." *Powell* v. *Alabama*, 77 L.Ed. 158, at p. 170, 287 U.S. 45 (8), 53 S.Ct. 55 (1932)

The cases are legion (none to the contrary so far as we can determine) and we cite only a few:

Hanson v. *Denckla*, 2 L.Ed.2d 1283, 1298-1299, 357 U.S. 235, 78 S.Ct. 1228 (1958);

Western Union Tel. Co. v. *Commonwealth of Pennsylvania*, 7 L.Ed.2d 139 (2), 368 U.S. 71, 82 S.Ct. 199 (1961);

International Shoe Company v. *State of Washington*, 90 L.Ed. 95, 326 U.S. 310, 66 S.Ct. 154 (1945)

Minnesota Commercial Men's Asso. v. *Benn*, 67 L.Ed. 573, 261 U.S. 140, 42 S.Ct. 293 (1923)

16A Am. Jur. 2d, *Constitutional Law*, Sec. 853, pp. 1070-1072.

"*Due process of law*, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, 'not violative of the fundamental principles of private right by a competent *tribunal having jurisdiction of the case* and proceeding upon notice and hearing'." *Frank* v. *State*, 142 Ga. 741 (1), at p. 747, 83 SE 645. (Emphasis added)

" 'Due process of law means the administration of general laws according to established rules, not violative of the fundamental principles of private right, by a competent *tribunal having jurisdiction of the subject matter*, and proceeding upon notice and hearing.' " *Dependable Insurance Co.* v. *Gibbs*, 218 Ga. 305, at p. 311, 127 SE2d 454. (Emphasis added)

See also, in this connection:

Arthur v. *State*, 146 Ga. 827 (1), 92 SE 637; and

Norman v. *State*, 171 Ga. 527 (2), at p. 529, 156 SE 203.

In Georgia, as in the federal courts, a judgment of a court having no jurisdiction is a mere nullity.

"9-12-16. Absent jurisdiction, judgment a nullity.

The judgment of a court having no jurisdiction of the person or the subject matter or which is void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it. (Orig. Code 1863, § 3513; Code 1868, § 3536; Code 1873, § 3594; Code 1882, § 3594; Civil Code 1895, § 5369; Civil Code 1910, § 5964; Code 1933, § 110-709.)" O.C.G.A. Sec. 9-12-16.

"An unconstitutional law is void and is as no law." *Fay* v. *Noia*, 9 L.Ed.2d 837, at p. 850, 372 U.S. 391, 83 S.Ct. 822 (1963).

"A judgment obtained without due process is a nullity and may be attacked directly or collaterally by parties or strangers." *Bradley* v. *St. Louis Terminal Warehouse Co.*, 189 F.2d 818 (13) (CA 8, 1951).

"A void judgment is a legal nullity. . . ."

Jordon v. *Gilligan*, 500 F.2d 701 (1) (CA 6, 1974)

Both the federal courts and the Georgia courts have criticized the judgment of a court without jurisdiction in a variety of ways:

A. It Is Void On Its Face If The Lack Of Jurisdiction Appears On The Pleadings Or In The Judgment.

Clay v. *Sun River Mining Co.*, 302 F2d. 599 (2) (CA 10, 1962);

Little v. *Celebrezze*, 259 F. Supp. 9 (D.C., Texas, 1966);

Payne v. *McCrary*, 187 Ga. 573, 1 SE2d 42

B. It Is Subject To Collateral Attack Anywhere.

"Judgment of court which lacked subject matter jurisdiction may be collaterally attacked." *Pan American Petroleum Corp.* v. *Candelaria*, 403 F.2d 351 (CA 10, 1968)

National Silver Co. v. *U.S.*, 333 F.Supp. 551, at p. 554 (U.S. Customs Court, 1971), affirmed 463 F.2d 1387 (U.S. Court of Customs and Patent Appeals, 1972);

Mitchell v. *Village Creek Drainage Dist.*, 158 F.2d 475 (CA 8, 1946);

O.C.G.A. § 9-12-16;

Hart v. *Manson*, 119 Ga. 865 (3), 47 SE 345;

Nuckolls v. *Merritt*, 216 Ga. 35, 114 SE2d 427.

C. It Is Subject To Attack At Any Time.

Glover v. *Coffing*, 158 F.2d 964 (CA 7, 1947), c.d. 91 L.Ed. 1844, 331 U.S. 829, 67 S.Ct. 1352;

Abraham Land & Mineral Co. v. *Marble Savings Bank*, 35 F.Supp. 500 (D.C., La., 1940);

Diva Lab v. *DeLoney & Co.*, 237 F.Supp. 868 (D.C., D.C., 1965);

Royal Indemnity Co. v. *Savannah*, 209 Ga. 383 (2), 73 SE2d 205;

Adams Drive, Ltd. v. *All-Rite Trades, Inc.*, 136 Ga. App. 703, 222 SE2d 174.

D. It Is The Duty Of A Court On Its Own Motion To Inquire Into Or Question Its Own Jurisdiction.

Rheinberger v. *Security Life Ins. Co.*, 146 F.2d 680, at p. 682 (CA 7, 1945);

Hospoder v. *U.S.*, 209 F.2d 427 (2) (CA 3, 1953);

"The able trial judge correctly held that it is the duty of every court to inquire into jurisdiction." *S. E. Underwriters Assn.* v. *Cravey*, 216 Ga. 599, 600, 118 SE2d 471, (1961);

"Since it is always the duty of a court to inquire into its jurisdiction, upon its own motion where there is doubt. . . ." *Williams* v. *State*, 217 Ga. 312, 122 SE2d 229.

This Court has pendent jurisdiction of the state law aspects of this case, including the question of the retroactive application of *Flewellen* to the case at bar. *United Mine Workers* v. *Gibbs*, 16 L.Ed.2d 218, 383 U.S. 715, 86 S.Ct. 1130 (1966); *Aldinger* v. *Howard*, 49 L.Ed.2d 276, 427 U.S. 1, 96 S.Ct. 2413 (1976).

We strongly contend that the December 5, 1983, opinion of the Georgia Supreme Court in the case at bar is not sound but, even if it is, we urge this Court to hold that it only applies to cases which had not gone to judgment prior to March 23, 1983, the effective date of *Flewellen* v. *Atlanta Casualty Co.*, 250 Ga. 709, 300 SE2d 673. Retroactive application of *Flewellen* to the case at bar (which went to judgment July 7, 1982) is clearly contrary to the Georgia and federal cases.

To apply *Flewellen* prospectively to *McFather, et al.* v. *Cotton States Mutual Insurance Co.* finds solid support in numerous Georgia and federal cases dealing with retroactivity of decisions in civil matters.

The three-pronged test limiting application of a civil court decision to prospective application is succinctly set forth in *Chevron Oil Company* v. *Gaines Ted Huson*, 404 U.S. 97, 30 L. Ed 2d 296, 92 S.Ct. 349 (1971):

> "[11-13] In our case dealing with the non-retroactivity question, we have generally considered three separate factors. *First*, the decision to be applied nonretroactively *must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied*, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra, at 496, 20 L.Ed.2d at 1243, *or by deciding an issue on first impression whose resolution was not clearly foreshadowed*, see e.g., Allen v. State Board of Elections, supra, at 572, 22 L.Ed.2d at 20. *Second*, it has been stressed that '*we must . . . weigh the merits* [404 US 107] *and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.*' Linkletter v. Walker, supra, at 629, 14 L.Ed.2d at 608. *Finally, we have weighed the inequity imposed by retroactive application*, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, *there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.*' Cipriano v. City of Houma, supra, at 706, 23 L.Ed.2d at 652." (30 L.Ed.2d at p. 306) (Emphasis added)

An application of the *Chevron Oil Company* principles to the case at bar will, we submit, clearly show that *Flewellen, supra*, should not be applied retroactively to the McFathers whose judgment was obtained July 7, 1982, approximately nine months prior to the effective date of *Flewellen* on March 23, 1983.

A. A New Principle Of Law Established Either By Overruling Clear Precedent On Which Litigants May Have Relied Or By A Decision Of First Impression Whose Resolution Was Not Clearly Foreshadowed.

The Georgia Supreme Court holds in McFather that the *Flewellen* court said for the first time that the "no fault" statute is clear and insurance companies must pay within the 30/60 day period or be liable for penalties, attorneys fees, and punitive damages. This was an issue of first impression and certainly its resolution was not clearly foreshadowed. It also overruled *Jones* v. *State Farm*, 156 Ga. App. 230, 274 SE2d 623, a clear past precedent on which the McFathers relied.

B. Will Retrospective Operation Further Or Retard The Operation Of The "No Fault" Law?

It will defeat the purpose of the no fault law, that is, prompt payment of claims which have been reasonably proven and calculated.

There is no way that retrospective operation could further the operation of the "no fault" law because the 30/60 day periods have long since expired and there will be no new or additional parties who are confronted by this problem.

C. Would Retroactive Application In Flewellen Produce Substantial Inequitable Results?

The inequitable results are obvious. These plaintiffs, scarred by the trauma of the death of both of their parents, have endured the agony of the Federal Court declaratory judgment case and the temporary restraining order, which seemed to tell them they would not have a chance for a day in court, as well as the four-day jury trial in Randolph County. At the end of all of

this, they appeared to have a fair and reasonable verdict and judgment, considering everything, which might be suddenly snatched from them if *Flewellen* is applied retrospectively.

We earnestly ask the Court, whatever its decision on other aspects of the case, to apply the certainty of *Flewellen* only in a prospective manner. Otherwise, retroactive application denies to the McFathers the equal protection of the law guaranteed to them by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, Section 1, in that policy holders who settled or tried their cases before *Flewellen* had their cases adjudicated on the basis of denial in 30/60 days from demand, instead of, as with the McFathers, in 30/60 days from March 23, 1983.

While this rule is best articulated in *Chevron Oil Company, supra*, many Georgia decisions of both state and federal courts have alluded to or applied it or substantially similar principles:

Walker v. *Walker*, 247 Ga. 502, 277 SE2d 45:

> "We decline to apply Coleman (*Coleman* v. *Coleman*, 240 Ga. 417) retroactively because, in our view, 'unjust results would accrue to' those who justifiably relied [on prior law].' " (p. 503);

Strickland v. *Newton County*, 244 Ga. 54, 258 SE2d 132:

> "This harsh rule (retroactivity) is subject to exceptions, however, where, because of the nature of the statute and its previous application, unjust results would accrue to those who justifiably relied on it." (p. 55);

In *Allan* v. *Allan*, 236 Ga. 199, 207, 223 SE2d 445, citing with approval several of the cases cited in *Chevron Oil Company, supra*, including *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1939), 84 L.Ed. 329, 60 S.Ct. 317, the Court said:

> "Moreover, we see no good reason why previously adjudicated year's support proceedings should now be subject to collateral attack because of a lack of actual notice in earlier proceedings. The fact that a procedure is now declared constitutionally deficient does not necessarily

make all proceedings held under the old procedure null and void retroactively. Prior to a determination that one aspect of a statute of this character has a constitutional weakness, the existence of the statute as it was relied upon is '. . . an operative fact and may have consequences which cannot justly be ignored. The past cannot be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy, in the light of the nature of both the statute and of its previous application, demand examination . . . [A]n all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.' Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1939) (dealing with the doctrine of res judicata)."

Gainesville Financial Services, Inc. v. *McDougal*, 154 Ga. App. 820, 270 SE(2) 40;

Financeamerica Corp. v. *Drake*, 154 Ga. App. 811, 270 SE2d 449;

State Farm Mutual Automobile Ins. Co. v. *Bates*, No. C81-281R (USDC, ND Ga., June 30, 1982);

Anderson Taylor v. *Hartford Casualty Ins. Co.*, CV 582-17 (USDC, SD Ga., August 3, 1982).

Even if it should be argued that the McFathers' July 7, 1982, judgment is not a vested right, it is, nevertheless, an inchoate right which is "legally protected":

"Even though the right is inchoate rather than vested, it is a legal right that will be protected. The U.S. Supreme Court, in Schroeder v. City of New York, 371 U.S. 208, 212 (1962), *did not restrict due process protection to 'property rights' but, instead, used the term 'legally protected interests'. Using this reasoning, we hold that the defendant's interest in the real property as a devisee under the will is a legally protected interest.*" *Allan* v. *Allan*, 236 Ga. 199, at pp. 201-202, 223 SE2d 445. (Emphasis added)

This is also a case in which the Georgia Supreme Court applied as the rules of decision two diametrically opposed (as

construed by that Court) decisions written by the same justice and obviously considered by the Court at the same time since one case was decided on March 23, 1983, and the other on March 30, 1983.

Flewellen v. *Atlanta Casualty Co.*, 250 Ga. 709, 300 SE2d 673, held that the "no fault" statute (O.C.G.A. § 33-34-5) was clear, was not vague, that it was not ambiguous, and ". . . that the terms are sufficiently definite and certain in meaning to give proper guidance to those bound by its terms." *This case was decided March 3, 1983, rehearing denied March 23, 1983.*

In *GEICO* v. *Mooney*, 250 Ga. 760, 300 SE2d 799, *decided March 16, 1983, rehearing denied March 30, 1983*, the opinion spoke of ". . . under these circumstances . . ." (page 763) and the Georgia Supreme Court said in the case at bar that the quoted words refer to the uncertainty in the law created by the original case of *Jones* v. *State Farm Mutual Automobile Insurance Co.*, 156 Ga. App. 230, 274 SE2d 623, cert. dismissed July 7, 1981, and the Court of Appeals decision of *Atlanta Casualty Co.* v. *Flewellen*, 164 Ga. App. 885, 300 SE2d 166, decided December 1, 1982, rehearing denied December 13, 1982. Neither *GEICO* nor Court of Appeals *Atlanta Casualty* could have made Cotton States uncertain. It had already made its decision. It denied the McFather claims on December 17, 1981 (Plaintiffs' Exhibit 28, T46-47, 160) and went to trial denying those claims in June-July 1982. Neither *GEICO* nor Court of Appeals *Atlanta Casualty* could possibly have caused Cotton States to suffer from uncertainty. Others may have been affected, but not Cotton States.

These two cases were written by the same Justice and, from the dates, were obviously considered by the Georgia Supreme Court at the same time. We submit that they are inconsistent and, therefore, arbitrary, unreasonable and capricious to the extent that the case at bar, in approving and attempting to reconcile them, denies McFather, et al., due process of law.

The General Assembly enacts laws. The Georgia Supreme Court has no legislative authority. As we have seen, it is a

court for the review of errors of law in the superior courts and certain constitutional city courts of Georgia.

When the Georgia General Assembly enacted the statutes in question here, they were clear. The Georgia Supreme Court said so *six times* in *Flewellen, supra*, and even said so in the *case at bar* (Opinion, p. 3): ". . . *O.C.G.A. § 33-34-6(b) requires that no fault benefits be paid within 30 days of a demand and proof of loss by the insured.*" (Emphasis added)

The Georgia Supreme Court had neither right *nor* authority to say that the statute does not mean what it clearly says—that, instead, it means 30 days from March 23, 1983. The Court could not support such an arbitrary and irrational holding and it did not try. It did the easiest thing it could do: Nothing. It did not cite a case (nor did Cotton States) to show that it had authority or jurisdiction to do what it did. If it had gotten into the area of authority and jurisdiction and propriety, it would have been lost.

Rewriting a statute is not the province of the judiciary. *American Booksellers Assn, Inc.* v. *McAuliffe*, 533 F.Supp. 50 (D.C., Ga., 1981).

The application of the terms of a statute to undisputed facts is a question of law. *Gold Kist, Inc.* v. *U.S.*, 339 F.Supp. 1249, (D.C., Ga., 1971), affirmed, I.C.C. v. Gold Kist, 93 S.Ct. 106, 409 U.S. 808, 34 L.Ed.2d 67 (1972).

In the construction of a statute, the court must look solely to what the statute says, not to what the court would prefer. *Hood* v. *First National Bank of Columbus*, 219 Ga. 283, 133 SE2d 19 (1963).

Courts may only interpret laws and may not change them. *Adams* v. *Powell*, 67 Ga. App. 460, 21 SE2d 111 (1942).

The statement of the Georgia Supreme Court in *GEICO* v. *Mooney*, 250 Ga. 760, 300 SE2d 799 (decided March 16, 1983, rehearing denied March 30, 1983): ". . . We cannot say that the insurer under these circumstances defended in bad faith" (p. 763) is strange, indeed, in view of the fact that *GEICO* was an

action for declaratory judgment. Did the quoted statement mean:

1. We can not say as a matter of law . . .?
2. As a matter of law, we can not say . . .?

The "under the circumstances" language is incredible. The only "circumstance" mentioned by the Court was the short-lived *Flewellen* case in the Georgia Court of Appeals—it lived from December 13, 1982 (rehearing denied) until March 3, 1983, when the Georgia Supreme Court reversed it. With all of the *Jones* principle litigation going on, could the Court mean that this 3 months hiatus overrode the clear language of the statute? With the same court, and the same Justice, writing the *GEICO* and the *Flewellen* decisions at the same term and within a few days of each other, did the Court really mean that "under the circumstances" had cleared the air?

There may have been some imperfections in the Georgia Motor Vehicle Accident Reparations Act, but there had been no case in which there was any question whatever as to when the 30/60 day period began to run. In fact, in *this very case, McFather, et al.* v. *Cotton States*, the Georgia Supreme Court itself, said that very thing:

> "Such a time extension was needed because *O.C.G.A. § 33-34-6(b) requires that no fault benefits be paid within 30 days of a demand and proof of loss by the insured.*" (Opinion, p. 3) (Emphasis added)

That is what the statute said and *that is what the Georgia Supreme Court said it said in this very case.* How, then, can this very same court, in the same case, in the same opinion, (Opinion, p. 6), remand the case at bar because Cotton States contended the law was "unsettled"? How can that be? The statute was not unsettled and the Court had just finished saying so on page 3 of the opinion.

So much for the time for computing penalties. What else was in the case? The only other thing was the liability for the optional PIP (personal injury protection) benefits and as to

that the Georgia Supreme Court literally said on page 6 of its opinion: "*The trial court did not err . . . in granting the McFathers' motion for directed verdict that they were entitled as a matter of law to optional PIP benefits.*" (Emphasis added)

Furthermore, aside from remanding to the trial judge the "tender" question which, as we have seen, was not in the case at all, the Georgia Supreme Court *affirmed* what the trial court had done: "Judgment affirmed in part; remanded in part." (Opinion, p. 8).

These last two paragraphs totally refute the rationale of the Court's decision. Furthermore, the Court made no effort to respond to the jurisdiction—due process arguments of the McFathers. When the very basis—the constitutional foundation—of the case was challenged—the Georgia Supreme Court simply did nothing, it said not a word. Why does one fail to answer an argument unless he has no answer?

The Georgia Supreme Court has not cited a case to support the bizarre notion that the *clear* words of the statute (which is characterized on page 3 of the opinion as "requires") are to be ignored until after at least three clear shots, the Court finds a substitute for those words which is acceptable to it.

Binns v. *Metropolitan Atlanta Transit Authority*, 250 Ga. 847, 301 SE2d 877, is disposed of in this fashion: "The question certified (there) was not the question raised here, and *Binns* is thus inapposite." The case is not in point because it is different. How? In what way? *Binns* was decided 27 days after *Flewellen*. *Binns* applied the "any evidence" rule to the very same issue of "no fault" penalties and damages, and fully supports the *McFathers*' position in the case at bar.

THE FEDERAL QUESTION IS SUBSTANTIAL

This is not an ordinary case. There are two unusual aspects to it:

A. The Supreme Court of Georgia really did deprive the plaintiffs of their vested property interest in a final money judgment on the basis of a single sentence written

into the appellate brief of defendant by its counsel, a contention of Cotton States that it had tendered optional benefits to dispose of or settle all issues in the case; in spite of the fact that the single sentence was not testimony or evidence, was related to a matter alleged to have happened 9 months after judgment, was not mentioned in the transcript or the record, was not assigned as error in the enumeration of errors, did not involve a judicial ruling and was not subject to appellate review by the Supreme Court of Georgia which had no jurisdiction in the case whatever.

B. The single sentence in defendant's brief, to which reference is made above, relates to an effort by defendant to escape the sanctions imposed by the Georgia statute (O.C.G.A. § 33-34-6) on a "no fault" insurance carrier for failure to pay claims within 30/60 days from receipt of demand by the claimant, as the statute clearly provides. The demands of plaintiffs were filed with defendant "no fault" insurer on October 30, 1981, (T. 26, 27, Plaintiffs' Exhibits 22), and were denied by it December 23, 1981 (T. 173, Plaintiffs' Exhibit 32), prior to the commencement of the trial in Randolph County Superior Court on June 27, 1982. Since defendant had not paid the claims, the jury awarded penalties, attorneys fees, and punitive damages, as the statute provided, as well as the basic policy benefits.

The "no fault" statute was enacted in 1974 and amended in 1975. On March 3, 1983, rehearing denied March 23, 1983, the Georgia Supreme Court *(having granted certiorari on its own motion)* rejected a constitutional attack on the statute as denying due process because it was ". . . unconstitutionally vague, violating due process, in that 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'" The Georgia Supreme Court actually said (p. 712): "We are unable to discern an ambiguity and hold that the terms are sufficiently definite and certain in meaning to give proper guidance to those bound by its terms." (p. 712). The Court further referred to its earlier holding in the same opinion that "the mandate of the law was clear" and observed of the "no fault" law: "The law had been in effect since 1975, Ga. L. 1974, p. 113 and the insurer proceeded at its own risk in failing to comply with the statute when issuing this policy in 1979." (p.

714) But this was not all. The Chief Justice, concurring, said: "I write to acknowledge Justice Clarke's special effort and to add one observation. In my view the intent of the General Assembly . . . as noted in the majority opinion, *becomes patently clear* when paragraph (b) is read in context with paragraph (a) as originally enacted. . . ." (p. 717) The Chief Justice then concluded by saying: "In my view, the General Assembly's amendment of paragraph (a) in 1975 . . . did not change the clear meaning of paragraph (b) as originally enacted and applied to PIP (personal injury protection) and property damage." (p. 717). (Emphasis added)

Thus, the Georgia Supreme Court had said in six different places that this law was clear and the Chief Justice had in effect, thanked Mr. Justice Clarke for his "special effort" in writing the opinion. So, the law had been case in concrete *before Flewellen*, had it not? Well, not exactly, although it certainly gave every appearance of being that way.

Counsel for the defendant claimed that *Flewellen* held that the law had never been clear *until Flewellen*. Therefore, claims the defendant, it did not know what to do until, for the first time, *Flewellen* on March 23, 1983, made the law clear. (They *should have known* because they knew all about *Flewellen*. According to the report of the decision, pp. 716 and 717, they submitted or joined in an *amicus curiae* brief.) However, counsel for defendant says they are relieved of attorney's fees, penalties and punitive damages if they offered to pay the basic policy benefits within 30 days *after March 23, 1983*, the date of the *Flewellen* decision (and 259 days after plaintiff's final judgment was rendered in the trial court).

Naturally, when the case at bar was before the Georgia Supreme Court, counsel for Plaintiffs reminded the Court of its ruling in *Flewellen*. On page seven of the opinion in the case at bar, the Chief Justice responded:

> *"While it is true that we held in Flewellen that 'the mandate of the law was clear' (quoted above) its interpretation by the bench, bar, insurers and insureds was obviously less so."* (p. 7) (Emphasis added)

Then the Chief Justice proceeded to cite the authority in an effort to prove his point that, as clear as *Flewellen* was (to the members of the Supreme Court), it was not clear to anyone else. He cited the Georgia Court of Appeals decision in *Flewellen*, 164 Ga. App. 885, 300 SE2d 166, decided December 1, 1982, rehearing denied December 13, 1982, (thus decided *before* the Supreme Court decision in *Flewellen*, and also cited *State Farm Fire & Cas. Co.* v. *Sweat*, Case No. C81-2506 (D.C. Ga. March 11, 1982) (also decided *before* the Supreme Court decision in *Flewellen*.) How then could two cases decided *before Flewellen* support the conclusion that while *Flewellen* was clear to the Supreme Court, *it was not clear to anyone else?* To demonstrate whether or not *Flewellen* clarified the situation, would it not be necessary to point to what Courts did *after Flewellen?*

In the case at bar, the Georgia Supreme Court said: "Moreover, in *Flewellen*, we did not adopt the continuing offer/reformation rational (sic) of the *Jones* decision." (p. 7). Nevertheless, the *Flewellen* decision achieved the same result by holding that: "The optional coverage required as a statutory minimum must thus be read into the policy." (p. 714) How could it matter that the reasoning was different?

If a ruling is correct for any reason, it will be affirmed, no matter the reason assigned by the Court.

City of Columbus v. *Stubbs*, 223 Ga. 765, 158 SE2d 392 (1967);

Griffin v. *Tift County*, 242 Ga. 746, 251 SE2d 262 (1978);

Glynn County v. *Palmatary*, 247 Ga. 570, 277 SE2d 665 (1981).

We are not sure what is required to make a substantial Federal question, but we do suggest none could be more substantial than those Federal questions involved in this case. The highest court in the State of Georgia, literally the court of last

resort, has *arbitrarily disregarded the limits of its constitutional and statutory jurisdiction in at least three ways*:

A. It had no jurisdiction to consider evidence or a contention not in the record or a contention which was not made in the trial court.

B. It had no jurisdiction to consider a contention not mentioned in the enumeration of errors.

C. It could only review questions of law from superior courts of Georgia.

It has completely disregarded the vested and legally protected interests of the plaintiffs in a jury verdict and the final judgment of a Georgia court of general jurisdiction, the highest trial court in that state, in the amount of $286,500.00.

We do not say that the 13 McFather orphans, whose parents were both killed instantly in the automobile accident covered by the Cotton States "no fault" insurance policy, deserve any better treatment than the defendant insurance company which wrote the policy, *but we do say they are entitled to equal justice under the law. They did not get it.*

In *Re Murchison*, 99 L.Ed. 942, at p. 946, 349 U.S. 133, 75 S.Ct. 623 (1955), this Court said: A "fair trial in a fair tribunal is a basic requirement of due process."

The McFathers did not get it and that denial of due process involved a substantial Federal question.

A court, or a case, or a state law precedent, can bring about a denial of due process, whether due process is denied to a governmental entity (state, county, municipality or authority), to an ethnic group, to a race, to any age group, to voters, to media people or to doctors.

The McFathers do not fall into any of these categories, but *individuals are also entitled to the protection of the Constitution, even as to their property, their vested rights and their legally protected rights in a money judgment.* No one can say that the right of a single McFather child to a fraction of this

mundane money judgment is less precious, in principle, than the right of an entire political entity.

The point is: If they can do it to a McFather, they can do it to me, my family, my profession, my church, my city. It is the principle of the thing. It affects us all.[1]

This Court has no case to consider, nor will it have, where the principle is more important than the principle involved in the rights of every single McFather child.

CONCLUSION

Let us make a supposition for the purpose of testing the theory of the decision in the case at bar.

A. Suppose that Cotton States had *not* appealed the adverse verdict and judgment of July 7, 1982. When the Georgia Supreme Court decided *Flewellen* on March 23, 1983, if Mr. Edenfield called Mr. Bowles within thirty days and tendered the optional benefits, would Cotton States be relieved of liability for penalty, attorney's fees and damages? The fact that the jury trial results were not appealed should not matter since the Georgia Supreme Court in effect affirmed everything which happened in the trial court. The fact that there was no longer a law suit should not matter because the Bowles-Edenfield discussions were not part of a trial and did not take place in court.

B. Take another case. Suppose Cotton States settled the case by paying 90% of the amount of the verdict on July 17, 1982. Could it tender the optional benefits within thirty days after *Flewellen* and then recover the amount it had paid in settlement of penalties, attorney's fees and punitive damages? Why not? The settlement could not have been more binding than our verdict and judgment for the optional benefits. *The Georgia Supreme Court said the verdict for them was properly directed and affirmed the case except for the tender remand.*

N.1 ". . . any man's death diminishes me . . . therefore never send to know for whom the bell tolls; it tolls for thee." *Devotions*, XVII, John Donne

We can truthfully say that retroactive application of the *Flewellen* rule raises questions and creates many problems which can neither be answered nor solved.

In the case at bar, *GEICO*, *Flewellen*, and the rest, no one has mentioned the undeniable principle upon which the whole structure of government rests:

Everyone is conclusively presumed to know the law. In this connection, see:

> *Mayor and Alderman of Savannah* v. *Wade*, 148 Ga. 766 (2), 98 SE 464;
>
> *Dixon* v. *Dixon*, 211 Ga. 557, 563, 87 SE2d 369;
>
> *First National Bank* v. *Monroe*, 135 Ga. 614, 616, 69 SE 1123;
>
> Georgia Digest, *Evidence*, KN65;
>
> C.J.S., *Evidence*, Sec. 132.
>
> "Just as everyone is charged with knowledge of the United States statutes at large . . ." *Federal Crop Ins. Corp.* v. *Merrill*, 92 L.Ed. 10, 15; 332 U.S. 380, 68 S.Ct. 1 (1947)
>
> "Like any other citizen, these officials are charged with knowledge of established law . . ." *Halperin* v. *Kissinger*, 424 F.Supp. 838 (8), 845 (D.C., D.C., 1976)

See also: *Bollow* v. *Federal Reserve Bank of San Francisco*, 650 F2d 1093, 1100 (CA 9, 1981)

Will this Court now say: Everyone except insurance companies knows the law? If so, we earnestly plead that the Court not apply this principle retroactively against the McFathers and their "legally protected interests" in their *final* judgment of July 7, 1983. The Georgia Supreme Court *did not change*, but rather approved and affirmed it in every way.

There is no basis for uncertainty about this "no fault" statute. It is simply a matter of thirty days or sixty days from demand. The Georgia Supreme Court has made it clear that if an insurance company fails to pay a claim within thirty days or

sixty days, that is enough for a *prima facie* case, whatever the reason. Previous statutes were on a different basis. See Code Sec. 56-1206 (now O.C.G.A. Sec. 33-4-6) which, in addition to the time lapse, required a finding ". . . that such refusal was in bad faith. . . ."

There could be no uncertainty about the 30/60 day periods and there was no uncertainty about the optional benefits because the Georgia Supreme Court affirmed the trial court ruling which directed a verdict for Plaintiffs for the optional benefits in the case at bar.

It has been said that the purpose of the "no fault" law was to cause the insurance companies to pay benefits promptly. Instead, by creating the confusion of which they complain (see the *Amicus* brief filed in the Georgia Supreme Court on behalf of the Georgia Trial Lawyers Association (Special Jones Committee)), they have delayed their day of reckoning for nine years—or, at least for nine years.

Cotton States was not uncertain about what the law was. It was uncertain as to whether or not it could get the law changed.

Cotton States made a big to do about its action for declaratory judgment, but it had *already denied* the claims of the McFathers (T. 46-47, 160, Plaintiffs' Exhibit 28). After its temporary restraining order was dismissed by Judge O'Kelley

as a sanction (Plaintiffs' Exhibit 32), nothing further has been heard about the declaratory judgment.

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By _____

HATCHER, STUBBS, LAND, HOLLIS & ROTHSCHILD

By _____
Attorney of Record

Attorneys for
Ben McFather, et al.,
Appellants-Plaintiffs

CERTIFICATE OF SERVICE

I certify that I am of Counsel for Ben McFather, et al., Appellants, and that I have served a copy of the within and foregoing Jurisdictional Statement by mailing a copy of the same, properly addressed, postage prepaid, to J. Franklin Edenfield, Esq., Spivey, Carlton & Edenfield, P.O. Box 309, Swainsboro, Georgia, 30401, and G. Conley Ingram, Esq., Alston & Bird, 1200 C & S National Bank Building, 35 Broad Street, Atlanta, Georgia, 30335, the attorneys for Appellee, Cotton States Mutual Insurance Company.

This _____ day of _____, 1984.

_____

Counsel of Record for Ben McFather, et al., Appellants

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ____

BEN MCFATHER, *et al.*,

Appellants,

v.

COTTON STATES MUTUAL INSURANCE COMPANY,

Appellee.

JURISDICTIONAL STATEMENT — STATE CIVIL CASE

PROOF OF MAILING—AFFIDAVIT

I, _____, one of the attorneys for Ben McFather, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1984, I deposited in a United States Post Office located at _____, Georgia, with first class postage prepaid and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, 40 copies of the Jurisdictional Statement of Ben McFather, et al., Appellants, in the above stated matter, together with Appearances and a

check covering docket fee. A copy of said Jurisdictional Statement is attached hereto.

_____(L. S.)

Sworn to and subscribed before
me at _____, _____
County, Georgia, this _____ day
of _____, 1984.

_____

Notary Public, _____
County, Georgia _____

CERTIFICATE UNDER RULE 28.4(c)

Appellants certify that the constitutionality of a statute of the State of Georgia affecting the public interest is drawn in question in this appeal, to-wit, Official Code of Georgia, Annotated (O.C.G.A.) Chapter 34 (Georgia Laws 1974, pp. 113, et seq., and Georgia Laws 1975, pp. 1202, et seq.) and, in particular, O.C.G.A. Sec. 33-34-6(b) and (c) (former Code Sec. 56-3406b, Georgia Code of 1933, as amended), and such fact will be certified to the Attorney General of the State of Georgia by service of this Jurisdictional Statement upon the Attorney General of the State of Georgia.

This ____ day of March, 1984.

Counsel of Record for Ben McFather, et al., Appellants

CERTIFICATE OF SERVICE ON ATTORNEY GENERAL OF THE STATE OF GEORGIA

I, Albert W. Stubbs, one of the attorneys for Ben McFather, et al., Appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the _____ day of _____, 1984, I served the foregoing Jurisdictional Statement upon the Attorney General of the State of Georgia by mailing a copy thereof to the Honorable Michael Bowers, Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, in a properly addressed envelope, with first-class postage prepaid.

_____
Attorney for Ben McFather,
et al., Appellants

P.O. Box 2707
Columbus, Georgia 31993

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

40032. COTTON STATES MUTUAL INS. CO.,

v.

MCFATHER, Co-Admr., *et al.*

HILL, Chief Justice.

Decided: Dec. 05 1983

This is another case arising from *Jones* v. *State Farm Mutual Auto Ins. Co.*, 156 Ga. App. 230 (274 SE2d 623) (1980) (cert. dismissed, July 7, 1981), overruled in *Atlanta Casualty Co.* v. *Flewellen*, 164 Ga. App. 885 (300 SE2d 166) (1982), which was itself reversed in *Flewellen* v. *Atlanta Casualty Co.*, 250 Ga. 709 (300 SE2d 673) (1983). Allegedly new issues are presented as to the constitutionality of the Georgia Motor Vehicle Accident Reparations Act, OCGA §§ 33-34-1 et seq. (no-fault insurance act), as well as the question of whether or not, as a matter of law, insurance companies should be subject to bad faith penalties for failing to pay *Jones'* claims before this court's decision in *Flewellen* was rendered and became final.

The *Jones/Flewellen* controversy has centered around the interpretation of OCGA § 33-34-5(b): "*Each application* for a policy of motor vehicle liability insurance sold in this state must contain *separate spaces* for the insured to indicate his acceptance or rejection of *each of the optional coverages* listed in subsection (a) of this Code section and no such policy shall be issued in this state unless *these spaces are completed and signed* by the prospective insured." (Emphasis supplied.)

In *Jones* v. *State Farm Mutual Auto. Insurance Co.*, supra, 156 Ga. App. at (1), a panel of the Court of Appeals held that the no-fault act required insurance companies to offer $50,000

coverage for PIP benefits which could be reduced to a minimum of $5000 PIP coverage at the insured's option. The court held that insurance companies, however, were required to obtain written and signed acceptance or rejection of each of these optional insurance benefits. Failing that, "[t]his statute contemplates that insureds who have not had an opportunity to accept or reject the optional no-fault coverage required to be offered under Code Ann. § 56-3404b(a) [now OCGA § 33-34-5(a)] are deemed to have been given a 'continuing' offer of such coverage from the date of the issuance of the liability policy until 30 days after being given the opportunity in writing to accept or reject the coverage." *Jones*, supra at p. 234. After the writ of certiorari was granted by this court, it was then dismissed on July 7, 1981.

Thereafter, on December 1, 1982, in *Atlanta Casualty Co.* v. *Flewellen*, 164 Ga. App. 885, 889-890 (300 SE2d 166), the full Court of Appeals in a 5 to 4 decision re-examined and overruled *Jones*, finding that the separate signature requirement to show acceptance or rejection of each optional coverage literally mandated by the statute, could not have been intended by the legislature, and that it was acceptable under the statute for the insured to indicate approval of the choices made on the form by one signature demonstrating awareness of the availability of the options. In overruling *Jones*, as opposed to distinguishing it, the majority appeared to have approved the form used in *Jones* (see 164 Ga. App. at 895).

This court granted certiorari and, on March 3, 1983, in *Flewellen* v. *Atlanta Casualty Co.*, 250 Ga. 709, 711 (300 SE2d 673) (1983), held "that the requirements of subsection (b) are satisfied by two signatures, one for acceptance or rejection of optional PIP and another to indicate acceptance or rejection of vehicle damage coverage." We also concluded that since under the statute $50,000 PIP is the amount the insurer must offer, and that amount must be specifically rejected in writing, "the insured has the right to demand and receive the benefit of $50,000 coverage upon tender by the insured of such additional premium as may be due and filing of proof of loss by the injured

party." Id. at p. 712. Rehearing was denied in *Flewellen* on March 23, 1983.

In the case now before us, Carl and Ann McFather were killed in an automobile accident on August 9, 1979. On October 25, 1979, personal injury benefits of $5,000 each were paid their administrators by their insurer, Cotton States Mutual Insurance Company. After *Jones*, the McFathers' administrators made demand on October 30, 1981, on Cotton States for the optional PIP benefits for each of their parents. After receiving the demand, Cotton States sought and received an extension of time, until December 21, 1981, in order to decide how to treat such *Jones'* claims.[1] Such a time extension was needed because OCGA § 33-34-6 (b) requires that no fault benefits be paid within 30 days of a demand and proof of loss by the insured. "In the event the insurer fails to pay each benefit when due, the person entitled to the benefits may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25 percent of the amount due and reasonable attorney's fees." OCGA § 33-34-6 (c) provides additionally that "in the event that an insurer fails or refuses to pay a person the benefits which the person is entitled to under this chapter within 60 days after proper proof of loss has been filed, the person may bring an action to recover the benefits; and if the insurer fails to prove that its failure or refusal to pay the benefits was in good faith, the insurer shall be subject to punitive damages."

Cotton States denied the McFathers' claim for additional PIP benefits on December 17, 1981. The McFathers then filed this suit on February 8, 1982, seeking the 25% penalty, attorney fees and punitive damages under the statutory penalty provisions, for failing to pay their claims within the allotted times. OCGA § 33-34-6 (b), (c), supra. The trial court directed a

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[1] As for Cotton States' motive for seeking the extension of time, see footnote 2, infra.

verdict holding that the McFathers were entitled to $90,000 optional PIP benefits as a matter of law, and the jury returned its verdict for $22,500 as the statutory penalty, $36,000 attorney fees and $138,000 in punitive damages. While Cotton States' motion for new trial was pending, we decided *Flewellen*. Cotton States appeals.

1. Cotton States argues that the no-fault act is unconstitutional on equal protection grounds insofar as OCGA § 33-34-6 (b),(c), supra, places the burden upon the insurance company of proving its good faith in order to avoid penalties. Cotton States argues that in all insurance matters other than automobile no-fault, the burden is upon the insured to show bad faith by the insurance company in order to recover penalties. E.g. OCGA § 33-4-6; see also OCGA §§ 33-5-58; 33-7-11(j).

In *Atlanta Casualty Co.* v. *Jones*, 247 Ga. 238, 241 (275 SE2d 328) (1981), we said: "Nor do we believe the Code section violates equal protection simply because other types of insurers do not have to prove good faith to avoid punitive damages (rather plaintiffs generally have to show *bad* faith). We cannot say that the legislature has placed automobile insurance carriers in an arbitrary classification for no valid reason." (Emphasis in original.) Although more could be said for classifying no-fault insurance separately from other insurance, suffice it to say that Cotton States' equal protection challenge has already been decided adversely to its contentions here.

2. Cotton States challenges the constitutionality of the no-fault act, as interpreted in *Flewellen*, on substantive due process grounds. It contends that the state has failed to carry its burden of showing, in light of *Flewellen*, that the signature requirement coupled with the insureds' right to make a later demand for the higher optional coverage upon tender of the premiums owed is a legitimate *means* of reaching the admittedly legitimate legislative *goal* that insureds knowingly and voluntarily reject optional coverage in favor of minimum mandatory PIP coverage. It argues that, as a result of *Flewellen*, it has been subjected to "economic devastation"

because the premiums collected on the $5,000 minimum mandatory PIP coverage are insufficient to pay all the claimants who have had accidents since 1975 and who can now retroactively increase their coverage to $50,000. Furthermore, it points out that it may be subject to penalties, attorney fees and punitive damages for resisting the payment of these claims.

Normally the burden is upon the challenger to show that a statute is unconstitutional. In arguing that the state must bear the burden of proving that the means used are reasonably related to the legislative goal of prompt payment of no-fault benefits, Cotton States relies on Debra P. v. Turlington, 644 F2d 397 (5th Cir. 1981). In Turlington, a class action, a group of minority students, who failed the first Florida functional literacy competency examination required under the Educational Accountability Act as a requirement for graduation from a Florida high school, challenged the test on due process grounds. Many students represented by plaintiffs failed the test. The court held that since the state had failed to show that the students had been taught what was required to pass the test, it had failed to meet substantive due process requirements of fairness, and the case was remanded for further hearing on that ground.

The Turlington decision is not applicable here. Although more sophisticated distinctions are available, suffice it to say that Cotton States is not a student educated by the state being denied a diploma by the state based upon a new testing requirement and a test prepared by the state covering matters not included in the student's education. In *Flewellen*, supra, 250 Ga. at p. 714, we said: "[W]e do not agree that to require post-accident coverage results in substantial injustice. This finding follows from the holding that the *mandate of the law was clear* and the obvious purpose of making the insured aware of the absolute right to minimum optional benefits. . . . The law has been in effect since 1975, Ga. L. 1974, p. 113, and the insurer proceeded at its own risk in failing to comply with the statute when issuing this policy in 1979." (Emphasis supplied.)

Therefore, we find that the no-fault act and the consequences which follow from the insurer's failure to comply with it, as set forth in *Flewellen*, does not violate Cotton States' substantive due process rights.

The trial court did not err in overruling Cotton States' constitutional claims, nor in granting the McFathers' motion for directed verdict that they were entitled as a matter of law to optional PIP benefits.

3. Cotton States also argues that it should not be subjected to paying bad faith penalties as a matter of law for not paying *Jones* claims during the period after *Jones* and before *Flewellen* was final. It contends that after *Jones* the law was unsettled and relies on the words "under these circumstances" in *Geico* v. *Mooney*, 250 Ga. 760, 763 (300 S.E.2d 799) (1983): "In view of the fact that other insurers in defending claims brought under OCGA § 33-34-5 (Code Ann. § 56-3404b) were able to secure a reversal of *Jones* in *Atlanta Cas. Co.* v. *Flewellen*, 164 Ga. App. 885 (300 SE2d 166) (1982), reversed by this court in *Flewellen* v. *Atlanta Cas. Co.*, 250 Ga. 709, supra, we cannot say that the insurer *under these circumstances* defended in bad faith." (Emphasis supplied.) We recognize the differences between the factual posture of this case and the *Geico* case as pointed out by the McFathers. However, as the *Geico* opinion shows, the phrase "under these circumstances" refers to the history of the *Jones* and *Flewellen* decisions, not to the facts in the *Geico* case. Consequently, the holding in *Geico* controls the outcome of the case before us. While it is true that we held in *Flewellen* that "the mandate of the law was clear" (quoted above), its interpretation by the bench, bar, insurers and insureds was obviously less so. Some insurers argued that one signature at the end of the application was sufficient; some insureds argued that each optional amount of PIP ($10,000; $25,000; $50,000) accepted or rejected must be signed separately, see *Flewellen*, supra, 250 Ga. at 711; and trial courts were reaching opposite results. See *Atlanta Cas. Co.* v. *Flewellen*, supra, 164 Ga. App. at 886-887; State Farm Fire & Cas. Co. v. Sweat, Case No. C81-2056 (N.D. Ga. March 11, 1982). Moreover, in *Flewellen*, we did not adopt the

continuing offer/reformation rational [sic] of the *Jones* decision.

"Under these circumstances", *Geico*, supra, we find that insurance companies which did not pay *Jones* claims while *Flewellen* was pending should not be penalized with bad faith penalties and damages under OCGA §§ 33-34-6(b), (c). We therefore hold that insurance companies which tendered the optional PIP benefits owed upon proper demands of their insureds within the statutory 30 and 60 day periods after March 23, 1983, when the motion for rehearing in *Flewellen* was overruled, are not subject to statutory penalties, attorney fees and punitive damages. *Geico* v. *Mooney*, supra; see also *State Farm Mutual Ins. Co.* v. *Bass*, 231 Ga. 269 (201 SE2d 444) (1973). *Binns* v. *Metropolitan Atlanta Transit Auth.*, 250 Ga. 847 (301 SE2d 877) (1983), was decided on a question certified by the Court of Appeals. The question certified was not the question raised here, and *Binns* is thus inapposite.

In the case before us, Cotton States states that it tendered the optional PIP benefits within 30 days of March 23, 1983, and thereby satisfied the time requirements of OCGA § 33-34-6 (b) and (c). The insureds dispute this assertion.[2] We therefore remand this case to the trial judge for resolution of this issue.

4. In light of the representation of Cotton States and the result reached in division 3, we need not address the remaining enumerations of error.

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[2] The McFathers also argue that Cotton States should nevertheless be liable for these bad faith damages for taking advantage of a professional courtesy (the extension of time referred to at fn. 1) by using the extension to file a class action in federal court and seek an ex parte order to enjoin all *Jones* claims against it. While the court does not approve such tactics, the federal court has already penalized Cotton States by vacating the ex parte order. We note here that Cotton States' misrepresentation caused no delay in payment of these benefits beyond that of the *Flewellen* decision. We therefore cannot uphold the verdict on this basis.

Judgment affirmed in part; remanded in part. All the Justices concur, except Marshall, PJ., who concurs in the judgment only, and Smith, J., who dissents to division 3 and the judgment.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA 12/20/83

The motion for a rehearing was denied today:
Case No. 40032 Cotton States Ins. Co. v. McFarther, [sic] Co-Admr, et al.

Smith, J., dissents

Your very truly,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA 1/18/84

The second motion for a rehearing was allowed filed and denied today:
Case No. 40032 Cotton States Mutual Ins. Co. v. McFather, Co-Admr, et al.

Smith, J., dissents

Your very truly,
MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX D

39426. FLEWELLEN v. ATLANTA CASUALTY COMPANY.
39427. VAN DYKE v. ALLSTATE INSURANCE COMPANY.

CLARKE, Justice.

On its own motion this court granted certiorari in these cases to address the issue of the interpretation of OCGA § 33-34-5 (formerly Code Ann. § 56-3404b) by the Court of Appeals in this litigation, *Atlanta Cas. Co.* v. *Flewellen*, 164 Ga. App. 885 (300 SE2d 166) (1982) and that court's overruling of its prior decision in *Jones* v. *State Farm Mut. Auto. Ins. Co.*, 156 Ga. App. 230 (274 SE2d 623) (1980), which interpreted the same statute.[1] The Court of Appeals consolidated the cases of Mrs. Flewellen and Mrs. Van Dyke and held that in each case the respective insurers had complied with the intent of the provisions of OCGA § 33-34-5 (Code Ann. § 56-3404b) governing optional benefits. We disagree with the statutory construction of the Court of Appeals and reverse the judgment in Flewellen, case no. 39426. For reasons set forth in this opinion, the judgment of the trial court in Van Dyke, case no. 39427, affirmed by the Court of Appeals is also affirmed by this court.

These cases begin with a basically simple dispute: are the insureds entitled to coverage of $5,000 or $50,000 for personal injury protection under the terms of their no-fault automobile insurance policies. Upon review of the arguments of the parties the question takes a quick turn toward issues of considerable complexity.

The insurers contend the statute fails to meet constitutional standards because of vagueness. They also assert that the insureds made valid rejections of the coverage above $5,000. Additionally, they contend that even if both of these arguments fail, the insureds in these cases are not entitled to the

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[1] These cases require an interpretation of the statute as it existed prior to the amendment in Ga. L. 1982, p. 1234.

benefits of the Court of Appeals' holding in *Jones* because it should not be given retroactive effect and because there was an accord and satisfaction or release.

We will treat the issues involved by dividing the case into four divisions. The divisions will deal with interpretation of the statute as applied to these contracts, constitutionality of the statute, retroactivity and accord and satisfaction.

1. Central to the resolution of these cases is the meaning of the language in OCGA § 33-34-5 (Code Ann. § 56-3404b) and more specifically the language of subsection (b). Much has been said and written on the words of this sentence but we cite once again the subsection in its entirety for purposes of explanation. "Each application for a policy of motor vehicle liability insurance sold in this state must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section and no such policy shall be issued in this state unless these spaces are completed and signed by the prospective insured." OCGA § 33-34-5(b) (Code Ann. § 56-3404b).

Chapter 34 of the insurance title is the Georgia Motor Vehicle Accident Reparations Act, OCGA § 33-34-1 (Code Ann. § 56-3401b), more commonly referred to as "no-fault" insurance. The clear legislative intent of this chapter is to require all motor vehicle owners to carry no-fault insurance and to mandate that certain losses will be cheaply and expeditiously repaid without respect to fault. The mandatory no-fault coverage imposed on every motor vehicle owner is a minimum of $5,000 for personal injury protection. OCGA § 33-34-4 (Code Ann. § 56-3403b). The statute then proceeds to impose upon every insurer the duty to offer certain coverage. This requirement appears in OCGA § 33-34-5(a) (Code Ann. § 56-3404b) and is divided into two categories, personal injury protection (PIP) and property damage to the motor vehicle. The minimum which must be offered for PIP is $50,000, but the statute allows the prospective insured to reduce the coverage to not less than $5,000 per person. This reduction by the policyholder must be in writing and signed. Therefore, both the insurer and the

policyholder face a minimum requirement. The insurer cannot offer less than $50,000 and the policyholder cannot accept less than $5,000.

To this point we have directed our attention to OCGA § 33-34-5 (a) (Code Ann. § 56-3404b). The immediate question is how many times and where must the policyholder sign in order to effect a reduction to an amount below the minimum which must be offered by the insurer.

Atlanta Casualty contends one signature at the end of the application is sufficient. Allstate says its form which contains one signature line adjacent to the options relating to PIP and one signature line adjacent to the options relating to property damage is sufficient if the appropriate rejection blocks are checked by the applicant and the signature lines are signed. The Court of Appeals attached appendices to its opinion in these cases showing the applications involved here and in *Jones*.

Van Dyke contends there can be no reduction of coverage unless there is a signature adjacent to every optional *amount* listed on the application showing either its rejection or acceptance.

To resolve the differences in these positions, we look to the plain words of the statute. OCGA § 33-34-5 (a) (Code Ann. § 56-3404b) requires "written consent" to either reject or reduce the coverage required to be offered. OCGA § 33-34-5 (b) (Code Ann. § 56-3404b) mandates that rejections or acceptances be accompanied by a signature, and it specifies the optional coverages to be those listed in subsection (a). The optional coverages listed there are PIP and property damage. See *Auto-Owners Ins. Co.* v. *Safeco Ins. Co.*, 245 Ga. 558, 561 (266 SE2d 175) (1981). We hold that the requirements of subsection (b) are satisfied by two signatures, one for acceptance or rejection of optional PIP and another to indicate acceptance or rejection of vehicle damage coverage. The Allstate application and the manner in which it was executed and signed by Van Dyke meets these requirements. The Atlanta Casualty application completed by Flewellen does not.

We turn next to the effect of a failure to make a binding rejection or reduction. It has been argued by the insurers that this results in no contract of insurance at all. This argument relies on the language of the statute which says that no policy will be issued unless the spaces are completed and signed.

The insureds argue that the offer of $50,000 coverage is a continuing offer and the policy is subject to reformation to include this coverage after a tender of the additional premiums for the additional coverage. We do not agree with either of the parties.

The contract must be construed in light of the statute. The statute says that $50,000 PIP coverage is the least the insurer must offer. OCGA § 33-34-5 (a)(Code Ann. § 56-3404b). The statute also says this offer of coverage may be refused only by a signed rejection in writing. OCGA § 33-34-5(a) and (b) (Code Ann. § 56-3404b). In the absence of such a rejection, the policy, therefore, provides $50,000 PIP coverage from its inception. The insured has the right to demand and receive the benefit of $50,000 coverage upon tender by the insured of such additional premium as may be due and filing of proof of loss by the injured party.

2. It is contended that the statute is unconstitutionally vague, violating due process, in that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *City of Atlanta* v. *Southern R. Co.*, 213 Ga. 736, 738 (101 SE2d 707) (1958). We are unable to discern an ambiguity and hold that the terms are sufficiently definite and certain in meaning to give proper guidance to those bound by its terms.

3. Atlanta Casualty next contends that if this court returns to the multiple signature requirement of *Jones*, that requirement should only be applied prospectively under the test in Chevron Oil v. Huson, 404 U.S. 97 (92 SC 349, 30 LE2d 296) (1971). In Chevron Oil, the United States Supreme Court held that in deciding a retroactivity question the court should:

(1) Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

(2) Balance of the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation would further or retard its operation.

(3) Weigh the inequity imposed by retroactive application, for, if a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the injustice or hardship by a holding of nonretroactivity.

Under the first factor, it is contended that *Jones* was a case of first impression and the result of the case was not "foreshadowed" due to the holding in *American Liberty Ins. Co.* v. *Sanders*, 120 Ga. App. 1 (169 SE2d 342) (1969) dealing with rejection of uninsured motorist coverage. The Code section interpreted there provided that the insured " 'shall reject the coverage in writing. " *American Liberty Ins. Co.* v. *Sanders*, at p.2. The court held that a signature at the end of the application satisfied the "in writing" requirement. Atlanta Casualty argues it justifiably relied on this precedent when issuing policies based upon an application which was in fact signed by the insured. We find this argument unpersuasive.

The Code section at issue here has different language than the one in *Sanders*. OCGA § 33-34-5 (a) (Code Ann. § 56-3404b) states a rejection or reduction must have the "written consent" of the insured and subsection (b) requires a signing of the rejection. If the legislature had *Sanders* in mind when drafting OCGA § 33-34-5 (Code Ann. § 56-3404b), then it clearly meant to ensure stronger requirements for rejection than "in writing."

Another facet of this argument is that even if the statute is clear in its multisignature requirement the remedy as set forth in *Jones* is not. *Jones* allows for acceptance of optional benefits

after the insured has already been involved in an accident. It has been argued and the Court of Appeals states in its opinion that if the application violates the statute then the contract of insurance is void. An insurance policy "which contains any condition or provision not in compliance with the requirements of this title shall not be rendered invalid due to the noncomplying condition or provision but shall be construed and applied in accordance with such conditions and provisions as would have applied had the policy, rider, or endorsement been in full compliance with the title." OCGA § 33-24-12 (Code Ann. § 56-2418). The statute controls if a policy is inconsistent with insurance laws *Nelson* v. *Southern Guaranty Ins. Co.*, 221 Ga. 804 (147 SE2d 424) (1966), and statutory provisions are in fact a part of each policy. See *State Farm Mut. Auto. Ins. Co.* v. *Landskroener*, 150 Ga. App. 308 (257 SE2d 376) (1979).

Subsection (b) states that no policy shall be issued unless the statute is complied with. OCGA § 33-34-3 (Code Ann. § 56-3405b) makes it clear that while OCGA § 33-34-5 (Code Ann. § 56-3404b) is for optional benefits, those benefits as well as those on OCGA § 33-34-4 (Code Ann. § 56-3403b) are *required minimum benefits.* "Nothing in Code sections 33-34-4 and 33-34-5 shall be construed to prohibit the issuance of policies providing coverage more extensive than the *minimum coverage required by those Code sections.*" (Emphasis supplied.) OCGA § 33-34-3 (b) (Code Ann. § 56-3405b), "Policies purporting to satisfy the requirements of Code Sections 33-34-4 and 33-34-5 shall contain a provision which states that, notwithstanding any of the other terms and conditions of the policy, *the coverage shall be at least as extensive as the minimum coverage required.*" (Emphasis supplied.) OCGA § 33-34-3 (c) (Code Ann. § 56-3405b). See also OCGA § 33-34-5 (c) (Code Ann. § 56-3404b).

In dealing with the second factor, we agree with the court in *Jones* that the intent of OCGA § 33-34-5 (Code Ann. § 56-3404b) is to ensure "that insurers offer optional coverages to applicants for no-fault insurance *and* that an applicant's waiver of his privilege to obtain optional coverages be made know-

ingly *and in writing.*" *Jones*, at p. 232. The purpose of the statute is to resolve conflicts which arise when an insured contends that he was not informed of his statutory right to optional benefits. When this claim is made, the resolution of the issue will be to look to the policy to determine if there was reduction or rejection of those benefits in conformance with the statutory scheme.

The optional coverages required as a statutory minimum must thus be read into the policy. We will not as a remedy read in the missing signed consent of the insured as it is the insurer who has violated its legal duty.

In weighing the equities as required by the third factor, we do not agree that to require post-accident coverage results in substantial injustice. This finding follows from the holding that the mandate of the law was clear and the obvious purpose of making the insured aware of the absolute right to minimum optional benefits. There was no prior approval of the Atlanta Casualty forms. The law had been in effect since 1975, Ga. L. 1974, p. 113, and the insurer proceeded at its own risk in failing to comply with the statute when issuing this policy in 1979.

The insurer also contends that the court erred in *Jones* in allowing reformation of the contract to result in post-risk coverage. They first argue that if the contract is issued in violation of the statute the contract is void and that a void contract cannot be reformed. See *Patterson* v. *Professional Resources*, 242 Ga. 459 (249 SE2d 248) (1978). As we have already stated, when an insurer issues a policy with provisions not in compliance with the law the contract will not be rendered void but the provisions of the statute will be grafted into the policy.

The insurer next contends that because the policy, i.e., the contract, is no longer in effect it may not be reformed because under the continuing offer theory no contract if formed until the offer is accepted. Therefore, they argue that if Mrs. Flewellen made an acceptance in 1981, the contract is formed at that time and does not relate back to the time of the accident.

See generally *Prior* v. *Hilton & Dodge Lumber Co.*, 141 Ga. 117 (80 SE 559) (1913); *Lunsford* v. *Electric Paint & c. Co.*, 55 Ga. App. 96 (189 SE 285) (1936).

Our holding in Division 1 answers this complaint. We have already stated that the failure to reject the options in the manner provided in the statute results in acceptance of the minimum coverage required to be offered which is $50,000. The absence of a rejection forms a contract for $50,000 PIP from its inception. This is not a case for reformation but a case of interpretation. The only requirement for activation of all the terms of the policy is the payment of any additional premium due and filing of proof of loss as set forth in Division 1.

4. (a) Mrs. Flewellen signed a general release in her settlement with the tortfeasor. We hold that full release to others for all tort claims cannot be pled as a defense by the insured's own insurer where the insurer has violated a statutory duty to the insured under OCGA § 33-34-5 (Code Ann. § 56-3404b).

(b) Each of the nine drafts from Atlanta Casualty in payment of the $5,000 PIP benefits contained the following release language: "Endorsement of this draft constitutes a release of all claims, known or unknown, the undersigned has or may have against the payor and any other persons on account of any and *all claims arising out of the loss referred to on the face hereof.*" (Emphasis supplied.) Each was endorsed by the insured. On the face of each draft there appears a description of the PIP benefits covered by that draft. The ninth draft states on its face that it is for "Final PIP lost income benefit."

The only PIP claim of Mrs. Flewellen which was arguably released in full by this language is her claim for lost income over $5,000. Her complaint alleges that she has incurred medical expenses of over $30,000. None of the drafts contains on its face a description of final or total payment for medical benefits.

We hold that the release language on the drafts does not release the claim for additional PIP benefits even as to the loss

of income. Payment of these PIP benefits is of course made regardless of fault. There was no dispute as to the nature of Mrs. Flewellen's injuries nor as to the money owed her under her contract of insurance.

In *Matthews* v. *Gulf Life Ins. Co.*, 64 Ga. App. 112 (12 SE2d 202) (1940), the insurer paid the face amount of a life insurance policy and took a receipt which stated that the payment was " 'in full satisfaction and final settlement of all claims and demands existing under the within policy.' " *Matthews*, at p. 113. The court held this language did not bar a claim for double-indemnity benefits in the policy because the insurer only paid out what was admittedly due. "A receipt marked [paid] in full for all claims arising under an insurance policy may not be pleaded as an accord and satisfaction in full, where it further appears that the sum actually paid was an amount which the company had already admitted owing and stood ready to pay in discharge of provisions of the contract other than those which are the basis of the recovery sought." *Matthews* (1), at p. 112. Additionally, it has been held that "Where a party receives no more than the amount legally owed and where at that time there is no dispute existing between the parties, then the absence of any additional consideration [such as settlement of a disputed account], causes the purported release to fail, it being a nudum pactum." *Stamsen* v. *Barrett*, 135 Ga. App. 156, 159 (217 SE2d 320) (1975).

This is not a case where an insurer has made a payment in settlement of a dispute as to the entitlement of the injured party to recover nor was there a dispute as to how much of a recovery was warranted. Atlanta Casualty merely paid what it admitted was owed to Mrs. Flewellen. Under the circumstances of this case, we hold the release is not effective to protect the insurer from liability for the additional PIP which may be owed under the no-fault optional benefit provisions.

Having found that Mrs. Flewellen is now entitled to enforce the optional benefits clause, we reverse the judgment of the Court of Appeals and hold that the trial court was correct in

granting summary judgment to Mrs. Flewellen on this issue. Because of our holding in Division 1, the Court of Appeals judgment as to Van Dyke is affirmed.

Judgment reversed in Case No. 39426. Judgment affirmed in Case No. 39427. Hill, C. J., Smith, Gregory and Bell, JJ., and Judge Joel J. Fryer, concur. Marshall, P. J., dissents. Weltner, J., disqualified.

Decided March 3, 1983—
Rehearing denied in Case No. 39426 March 23, 1983.
Certiorari to the Court of Appeals of Georgia—164 Ga. App. 885.

Beauchamp, Hedrick & Keenan, William H. Hedrick, for appellant (case no. 39426).

Alexander & Van, William C. Sanders, for appellee.

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Thomas S. Carlock, R. Clay Porter, Martin Kent, for appellee.

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HILL, Chief Justice, concurring.

I concur in the opinion and judgment of the majority and commend its author and the other members of the court for working tirelessly to expedite this decision to assist the bench and bar in the resolution of cases such as these. See Gloser & Darroch, "*Jones* v. *State Farm:* An Expensive Lesson," 18 Ga. State Bar J. 180 (1982); Butler, "*Jones* v. *State Farm:* The Insured's Perspective," 19 Ga. State Bar J. 45 (1982).

I write to acknowledge Justice Clarke's special effort and to add one observation. In my view, the intent of the General Assembly in enacting paragraph (b) of OCGA § 33-34-5 (Code Ann. § 56-3404b), as noted in the majority opinion, becomes patently clear when paragraph (b) as originally enacted is read in context with paragraph (a) as originally enacted. Ga. Laws 1974, pp. 113, 117-118, read as follows:

"Section 4. Optional coverage. (a) Each insurer *shall* also *make available* on an optional basis the following coverage:

"(1) an aggregate limit of benefits payable without regard to fault up to fifty thousand dollars ($50,000) per person which may be *rejected, or reduced* to not less than an aggregate limit of benefits payable without regard to fault of five thousand dollars ($5,000) per person, *by written consent* of the policyholder. Benefits purchased in excess of five thousand dollars ($5,000) shall be paid without apportionment to cover any expenses enumerated in Section 3 (b); and

"(2) compensation, without regard to fault, for damage to the insured motor vehicle not to exceed the actual cash value of the vehicle at the time of the loss, including up to ten dollars ($10) per day with a maximum of three hundred dollars ($300) for the loss of use of such motor vehicle; provided that benefits payable under this paragraph (2) may be subject to deductibles at the *written election* of the policyholder.

"(b) Each application for a policy of motor vehicle liability insurance sold in this State must contain separate spaces for the insured to indicate his acceptance or rejection of *each of the optional coverages listed in subsection (a) above* and no such policy shall be issued in this State unless these spaces are completed and signed by the prospective insured." (Emphasis supplied.)

In my view, the General Assembly's amendment of paragraph (a) in 1975 (Ga. L. 1975, pp. 1202, 1206-1207) did not change the clear meaning of paragraph (b) as originally enacted and as applied to PIP and property damage.

MARSHALL, Presiding Justice, dissenting.

I must respectfully dissent for the reasons stated in the majority opinion of the Court of Appeals. *Atlanta Cas. Co.* v. *Flewellen*, 164 Ga. App. 885 (300 SE2d 166) (1982).

APPENDIX E

BRIEF OF THE EVIDENCE

The trial evidence showed that Carl and Ann McFather, the father and mother of Plaintiffs, were killed as a result of an automobile accident occurring on August 9, 1979 (T. 18, 55-56). At the time of the accident, Plaintiffs' decedents were insured under a policy of automobile liability insurance, being Policy No. FA-601111 and issued by Defendant (T. 50, 56, 97-98 and Plaintiffs' Exhibits 29 and 36). Plaintiffs, Ben McFather and Frank McFather, are the duly appointed Administrators of the estates of Carl and Ann McFather (T. 21 and Plaintiffs' Exhibit 1), as well as the duly appointed Guardians for all of the nine (9) minor children (T. 21 and Plaintiffs' Exhibit 4). At the time of the death of said decedents, there were nine (9) dependent and minor children, ranging in age from 5 to 17 (T. 18-20), and four (4) other children eighteen years or older.

Following the death of said decedents, and on October 25, 1979, Plaintiffs made application with Defendant for personal injury protection benefits under said policy and were paid by Defendant the sum of Five Thousand Dollars ($5,000.00) for each deceased parent (T. 23-26 and Plaintiffs' Exhibit 21). No releases were exchanged.

At the time of the death of Carl McFather, he was in good health (T. 19, 20), a sales manager with Independent Life Insurance Company (T. 20), and had earned more than Twenty Thousand Dollars ($20,000.00) per year for the last two (2) years of his life (T. 44, 47, 80 and Plaintiffs' Exhibits 24, 25, 26 and 27). At the time of Ann McFather's death, she was in good health (T. 19-20) and rendered all essential services to her family, such as cooking, homemaking and looking after the nine (9) minor children (T. 59, 60). As a result of her death, Plaintiffs hired an employee to perform such essential services at a rate of $3.00 per hour, which employee worked five (5) days a week and would do so until all of the minor children were grown (T. 59, 60). Plaintiffs proved during the trial of their case, without contradiction by Defendant, that reasonable attorney's fees

would be anywhere from 30 to 40% of the amount recovered (T. 222).

Plaintiffs themselves proved Defendant's bad faith in refusing to pay the benefits by introducing the following evidence during their case or on cross examination of Defendant's witnesses.

On October 30, 1981, Plaintiffs made demand on Defendant for the optional personal injury protection benefits with regard to each of their parents and pursuant to O.C.G.A. § 33-34-6 (former Ga. Code § 56-3406b) (T. 26 and Plaintiffs' Exhibit 22). Defendant received the demand for the optional benefits on November 3, 1981 (T. 27-28 and Plaintiffs' Exhibit 23). Plaintiffs also made an unconditional offer to tender any additional premiums owed (T. 125). Plaintiffs, through their counsel, were contacted by Defendant, through its counsel, by telephone on November 25, 1981 and advised that Defendant's counsel had just received the file and needed some extra time to decide how to handle the same and asked Plaintiffs for an agreement that the 30/60 day statutory time period would not begin to run until after December 21, 1981. Plaintiffs' counsel, believing Defendant's counsel, agreed (T. 130, 162, 169). Unknown to Plaintiffs' counsel and not revealed to Plaintiffs' counsel in Defendant's counsel's telephone request, Defendant had employed its said counsel in early to mid-September (T. 245, 266). Defendant and its said counsel had already met in September and drafted form denial letters, exactly the same as the one subsequently sent to Plaintiffs (T. 245-246, 292-294). In mid-November, prior to Defendant's telephone call to Plaintiffs, and also undisclosed to Plaintiffs, Defendant had already drafted a class action declaratory judgment complaint to be filed in the United States District Court (T. 246, 303, 305). The rough draft complaint was the same type and format eventually filed against Plaintiffs in the United States District Court, Gainesville Division (T. 305). At all times Defendant was aware that the Plaintiffs' claims were large claims that involved death cases, and Defendant wanted to stop the running of the 30/60 day demand time period. The Defendant was

particularly aware of the effect of the "Federal Anti-Injunction Act", 28 U.S.C.A. § 2283, in its misleading of Plaintiffs, because Defendant knew that the effect of the said federal statute was that if a plaintiff, like the Plaintiffs in this case, files a lawsuit in the state court, then this statute prohibits a federal court or judge from enjoining a proceeding in a state court that is already pending prior to the time that the federal action is filed (T. 283). This information Defendant had, prior to its getting counsel to call on Plaintiffs for additional time, without disclosing any of these facts to Plaintiffs (T. 272).

Defendant's counsel made an appointment with United States District Judge Dudley Bowen in Augusta, Georgia, on November 13, 1981 (according to transcript, see Plaintiffs' Exhibit 33), for the purpose of filing a class action declaratory judgment suit which they began drafting in mid-November (T. 277). In addition to other relief, it contained prayers for a temporary restraining order and a permanent injunction against filing suit against Defendant Cotton States. When Defendant's counsel met ex parte with Judge Bowen, he would not sign the temporary restraining order without first setting the matter down for hearing and giving notice to the purported class members. Defendant's counsel then did not want to file and, in fact, did not file suit in Judge Bowen's Court and allow potential class members or claimants a chance to have a hearing on the temporary restraining order because claimants would then have a chance to file in state court, and, thus, be protected by the "Anti-Injunction Act" (T. 281-284). Defendant did not file in Judge Bowen's Court, even though he told them to go ahead and file the suit in his Court and he would afford them a hearing. (See Plaintiffs' Exhibit 33 and T. 281). Defendant's counsel then got an appointment with United States District Court Judge William O'Kelley in Atlanta, Georgia, and met ex parte with him on December 16, 1981, and again, ex parte, a week later on December 23, 1981, at which time Judge O'Kelley signed the temporary restraining order, enjoining all claimants in the class who had not already brought an action in the state courts from suing Cotton States (T. 173, 279).

Defendant refused to comply with Federal Rules of Civil Procedure 65(b) and specifically, that portion which requires that a temporary restraining order be issued against an opposite party only upon the requesting party's compliance with certain provisions, specifically, showing by affidavit to the Court that the requesting party will suffer irreparable injury, loss or damage before the adverse party or his attorney can be heard in opposition and the requesting party's attorney must certify to the Court in writing his efforts, if any, to notify the opposing side. The Defendant made no such certificate and made no effort to contact the opposing side and obtained a temporary restraining order against Plaintiffs in this case without any notice or hearing, even though a full week transpired between the time Defendant filed its declaratory judgment lawsuit with O'Kelley and the time that the Judge called counsel back and signed the same (T. 284-286 and Defendant's declaratory complaint contained in Plaintiffs' Exhibit 32). Defendant did not want the Plaintiffs to know about the federal lawsuit or the attempts to file the federal class action because the Plaintiffs could have filed their suit in the state court and not been enjoined (T. 235, 284-286). Defendant did all of these things, after first contacting Plaintiffs as above described and misleading them about Defendant's intentions. Defendant assumed that based on the agreement that they had obtained from Plaintiffs that Plaintiffs would not file suit and Defendant took Plaintiffs' gentleman's agreement not to take any action until December 21, 1981, and without any further notice to Plaintiffs sued and enjoined them in the United States District Court in Gainesville (T. 324). Defendant never advised Plaintiffs of its plans to file the declaratory judgment action in the federal court, although they had decided not to pay any "Jones claims" (that is, of the type approved in *Jones* v. *State Farm*, 156 Ga. App. 230, 274 S.E.2d 623). (T. 323, 324, 171, 477). It was known by Defendant that the draft that it prepared in mid-November, prior to its obtaining an agreement from Plaintiffs, would be filed in the federal court in the form of a class action declaratory judgment (T. 468), and, in fact, Defendant had decided in September to deny whatever claims

there were by drafting form denial letters, wherein the blanks would be filled in to adjust any given claim (T. 475). Defendant admitted that it decided to file the federal class action on December 4, 1981 (T. 247-253), and it knew that because of the agreement that it had obtained from Plaintiffs that it would not take any action until December 21, 1981 (T. 324). Knowing all of this, Defendant never advised Plaintiffs any further and never called them back after they obtained their "gentleman's" agreement (T. 323, 324). The next notice Plaintiffs had was a telegram notice of a lawsuit in the United States District Court, Gainesville Division, and a temporary restraining order, on December 24, 1981 (T 171). Prior thereto, Defendant had sent to Plaintiffs a denial of their claim for benefits on December 17, 1981 (Plaintiffs' Exhibit 28, T. 46-47, 160), which denial had been drawn up in September, 1981 (T. 246, 475).

The Defendant, prior to serving Plaintiffs with the federal class action and the temporary restraining order, did not name the Plaintiffs as parties therein and did not obtain any class certification prior to serving Plaintiffs (T. 174-179). The Plaintiffs were not served personally but rather through a mail-o-gram sent to their attorney (T. 28-29, Plaintiffs' Exhibit 31). Plaintiffs were forced to go to Gainesville, Georgia to litigate in the federal court which required filing various motions, affidavits and briefs requesting relief from the temporary restraining order (T. 172-176). Defendant, although having claims ranging in value from $1.00 to $90,000.00, picked a claim of $3,000.00 by a man by the name of J. O. Anderson to represent a class of 50 to 60 people, and which claims would total 10 to 12 million dollars (T. 318, 470). At the time Defendant obtained the temporary restraining order from Judge O'Kelley, they did not advise him of their earlier attempt and of the refusal of Judge Bowen to sign the temporary restraining order prior to a hearing. At the Gainesville, Georgia, hearing, lawyers for class members produced a transcript of the hearing before Judge Bowen and, on February 5, 1982, Judge O'Kelley dismissed Defendant's temporary restraining order in the action pending in the federal court in Gainesville and specifically, said

"that the temporary restraining order was dissolved as a sanction against the sort of undisclosed judge shopping that was engaged in by Plaintiffs (Defendant here)." (T. 173, Plaintiff's Exhibit 32). Defendant, Cotton States, acknowledges and admists that it takes responsibility for all of the actions taken by its attorneys (T. 129-134).

As soon as Defendant's temporary restraining order was dissolved, Plaintiffs filed this action in the Superior Court of Randolph County, Georgia, on February 8, 1982 (R. 3).

APPENDIX F

THE EVENTS IN SEQUENCE

The significant events occurred in this sequence:

1.

Death of Carl and Ann McFather in automobile crash on August 9, 1979 (T. 18).

2.

Jones v. *State Farm*, 156 Ga. App. 230, decided October 22, 1980. Certiorari granted by, and then vacated by, the Supreme Court of Georgia.

3.

Claims of Ben McFather, et al., filed with Cotton States on October 30, 1981 (T. 26, 27; Plaintiffs' Exhibit 22) and received by Cotton States November 3, 1981 (T. 27, 28; Plaintiffs' Exhibit 23).

4.

Cotton States denies the claims of the McFathers on December 23, 1981 (T. 173, Plaintiffs' Exhibit 32).

5.

Mr. Bowles, counsel for the McFathers, received a Mailgram from Cotton States advising that the McFathers, as members of an uncertified class of claimants, had been enjoined by U.S. District Judge William C. O'Kelley on December 23, 1981 (T. 173, Plaintiffs' Exhibit 32) from filing suit against Cotton States on December 23, 1981 (T. 171, 178, Plaintiffs' Exhibit 31).

6.

Judge O'Kelley dismisses the temporary restraining order ". . . as a sanction. . . .": February 5, 1982 (Plaintiffs' Exhibit 32).

7.

The McFathers file suit in the case at bar against Cotton States in the Superior Court of Randolph County, Georgia: February 8, 1982 (R. 3).

8.

The McFather case came on for trial in June, 1982 and resulted in a jury verdict on June 30, 1982, in favor of the McFathers and against Cotton States in the amount of $286,500 (R. 227) which was made the final judgment of the Superior Court on July 7, 1982 (R. 228).

9.

On December 1, 1982, rehearing denied December 13, 1982, the Georgia Court of Appeals, in *Atlanta Casualty Co.* v. *Flewellen*, 164 Ga. App. 885, overruled *Jones* v. *State Farm*, in a decision of four of the nine judges; the fifth judge concurred; and the other four judges, including the Chief Judge and the Presiding Judge, dissented. Flewellen promptly applied to the Supreme Court of Georgia for certiorari.

10.

On March 23, 1983, the Supreme Court of Georgia, having granted certiorari, reversed the Georgia Court of Appeals in *Flewellen* v. *Atlanta Casualty Co.*

11.

On April 10, 1983, the notice of appeal from the McFather judgment was filed in the Superior Court of Randolph County, Georgia.

12.

On June 30, 1983, Cotton States filed its brief in the Georgia Supreme Court and for the *first and only time* made reference

to (much less, proof of) the "tender" question in its *appellate brief:* This is the totality of what it said:

> "*Since Appellant* (Cotton States) *made tender to plaintiff of the policy benefits plus statutory interest and court costs, within thirty days of Flewellen, as a matter of law, the jury verdict awarding penalties should be stricken.*" (Brief, p. 17)

It should be noted that *approximately one year after final judgment was entered for the McFathers* on July 7, 1982 (the Certificate of Service on the brief of Cotton States is dated June 30, 1983), this single unsupported, undocumented contention of Cotton States, this single sentence, this bare assertion of counsel, was the only thing in the entire record *or* transcript of the case which alluded to what became the basis of the ultimate action of the Supreme Court of Georgia: The question of "tender".

This is precisely the way the matter stood when the case came on for oral argument in the Supreme Court of Georgia, and when it was remanded by that Court on December 5, 1983.

To summarize the events regarding the "tender" (which Cotton States had managed to forecast would be held by the Georgia Supreme Court to be controlling on the basis of *Flewellen, supra,* although there is *not a line in Flewellen* to suggest it).

The "tender" is never mentioned in the transcript of the trial evidence or the record of the case. It did not occur before or during the trial. In the Supplemental Brief of Appellant (Cotton States brief, p. 2), the following statement appears: ". . . *there was no opportunity to place this correspondence in the record of the trial court prior to the forwarding of that record by the Clerk.*" (Emphasis added) This is a true statement. However, the word "prior" may be confusing. The real reason "there was no opportunity" was that it was not a part of the record of the trial court, it did not occur during or before trial,

and it had no place whatever in the record. In fact, it never occurred period. Counsel may have tried to settle the judgment, but he never tendered benefits.

When this case "left" Randolph Superior Court, McFather, et al., had a final (in the sense of being appealable) judgment for $286,500. What happened to it after that? The answer is: Only one thing—the lawyers for Cotton States wrote into their brief a *single sentence*. It was a *contention of Cotton States*. It was not evidence. It was a claim of their lawyers, but to the Georgia Supreme Court it was the whole case.

APPENDIX G

IN THE SUPREME COURT OF GEORGIA

Case No. 40032

COTTON STATES MUTUAL INSURANCE COMPANY,
Appellant,

v.

BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of CARL MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of ANN B. MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Guardians of DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER and FRANK MCFATHER, as next friends for DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER, FRANK MCFATHER, PENNY MCFATHER, JILL MCFATHER, JEFF MCFATHER, DANIEL MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER,
Appellees,

NOTICE OF APPEAL

Notice is hereby given that Ben McFather, et al., Appellees-Plaintiffs in the above stated case, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia, dated and entered December 5, 1983, and in which Appellees' motion for rehearing was denied by the Supreme Court of Georgia and entered on December 20, 1983, and in which Appellees' motion for reconsideration (or second motion for rehearing) was denied and entered on January 18, 1984. In the event that appeal is not applicable and writ of certiorari is required, then this Notice shall form a part of

the petition of Ben McFather, et al., Appellees, for the writ of certiorari to the Supreme Court of the United States to review the said judgments of the Supreme Court of Georgia.

The judgments of the Supreme Court of Georgia constituted a final judgment affirming in part and remanding a jury verdict dated and filed June 30, 1982, and judgment dated and filed July 7, 1982, in the Superior Court of Randolph County, Georgia, in favor of McFather, et al., Appellees, ordering and adjudging that McFather, et al., Appellees, as Plaintiffs, recover of Cotton States Mutual Insurance Company, Appellant, the sum of Two Hundred Eighty-six Thousand Five Hundred Dollars ($286,500.00) and the costs of the action in the amount of $269.00.

The Clerk of the Supreme Court of Georgia, which Court is possessed of the record, will omit nothing from the record on appeal in that Court, including the transcript of evidence and proceedings filed for inclusion in the record on appeal, and said Clerk of the Supreme Court of Georgia is requested to certify said record and provide for its transmission to and filing with the Clerk of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction over this appeal under 28 U.S.C.A., § 1257(2), and under 28

U.S.C.A., §§ 1257(3) and 2103, in the event that appeal is not applicable and the writ of certiorari is required.

Dated: February 29, 1984.

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By Albert W. Stubbs
ALBERT W. STUBBS

Attorneys for Ben McFather, et al., Appellees-Plaintiffs in the Trial Court and now Appellants to the United States Supreme Court.

CERTIFICATE OF SERVICE

I certify that I am Counsel for Ben McFather, et al., Appellees-Plaintiffs, and that I have served the within and foregoing Notice of Appeal and/or Petition for Writ of Certiorari by depositing copies of the same in a United States Post Office, properly addressed, with first class postage prepaid, to J. Franklin Edenfield, Spivey, Carlton & Edenfield, P.O. Box 309, Swainsboro, Georgia, 30401, and to Alston & Bird, 1200 C & S National Bank Building, 35 Broad Street, Atlanta, Georgia 30335, attorneys of record for Cotton States Mutual Insurance Company, Appellant-Defendant.

This 1st day of March, 1984.

/s/ ALBERT W. STUBBS
Of Counsel for Ben McFather, et al.,
Appellees-Plaintiffs in the trial court
and now Appellants to the United States
Supreme Court.

Office - Supreme Court, U.S
FILED
APR 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1532

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of CARL MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of ANN B. MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Guardians of DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER and FRANK MCFATHER, as next friends for DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER, FRANK MCFATHER, PENNY MCFATHER, JILL MCFATHER, JEFF MCFATHER, DANIEL MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER,

Appellants,

v.

COTTON STATES MUTUAL INSURANCE COMPANY,

Appellee.

On Appeal from The Supreme Court of Georgia And/Or Petition for Writ of Certiorari

---

APPELLEE'S MOTION TO DISMISS THE APPEAL

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QUESTION PRESENTED FOR REVIEW

Does the Supreme Court of Georgia's decision in *Cotton States Mutual Insurance Co. v. McFather*, 251 Ga. 739, ___ S.E.2d ___ (1983), and its application of O.C.G.A. §33-34-6 (Michie 1982) therein, violate the Appellants'[1] due process or equal protection rights under the United States Constitution?

---

[1] The parties to this appeal, as named in the caption of the case, will be referred to herein as "Appellants" and "Appellee." Pursuant to Supreme Court Rule 28.1, Appellee shows the Court that it is a corporation and that the following companies are affiliates or subsidiaries of Appellee: Shield Insurance Company, Cotton States Life & Health Insurance Company, Cotton States Investment Company, and STATS, Inc.

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STATEMENT OF THE CASE

Appellee respectfully submits this its "Statement of the Case," in addition to the "Statement" included by the Appellants in their "Jurisdictional Statement,"[3] since, *inter alia*, the Appellants' "Statement" omits the chronology of the Georgia appellate courts' construction and "clarification" of provisions of the unconstitutionally vague no-fault insurance statute pursuant to which the Appellants originally filed their cause of action against the Appellee in the Georgia trial court. (Appellee also does not agree with much of the argumentative nature of the Appellants' "Statement" or with Appendices E and F incorporated into Appellants' "Statement," but finds it premature at this point in the proceedings to address those.)

Appellants' original demand upon Appellee for additional no-fault personal injury protection ("PIP") benefits was premised upon the decision rendered by a three-judge panel of the Georgia Court of Appeals in *Jones v. State Farm Mutual Insurance Co.*, 156 Ga. App. 230, 274 S.E.2d 623 (1980), *cert. dismissed*, 248 Ga. 46, 280 S.E.2d 837 (1981) (hereinafter referred to as *"Jones"*). *Jones* held that the Georgia no-fault statute respecting the offering of optional PIP coverages, O.C.G.A. §33-34-5 (Michie 1982), formerly *Ga. Code Ann.* §56-3404b

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[3] Appellants' "Jurisdictional Statement" will be cited hereinafter as "Appellants' Juris. Statement, p. ___."

(Harrison 1977),[3] required "separate signatures" on the insurance application respecting acceptance or rejection of each of the optioal no-fault coverages. Failure by the insurer to obtain such "separate signatures" resulted in a "continuing offer" to provide the optional levels of coverage. This "continuing offer" could be accepted even after the insured had been involved in an automobile accident and had previousy paid premiums only for the lower coverage, and even though evidence indicated knowing consent by the insured to the lower level, and would apply retroactively and cover the losses suffered in that accident. After the Georgia Supreme Court dismissed its grant of certiorari in *Jones* as improvidently granted in September of 1981, Appellee, along with other members of the automobile insurance industry in the State of Georgia, began receiving a multitude of claims based upon the *Jones* decision for retroactive increased no-fault PIP coverage. Included among these claims was the claim of the Appellants.

Appellee denied the Appellants' claim in December of 1981, for the reason that Appellee did not understand the No-Fault Act to require the payment of the claim asserted by the Appellants. Appellee,

---

[3] On November 1, 1982, the Goergia Motor Vehicle Accident Reparations Act, (hereinafter the "No-Fault Act"), was recodified as O.C.G.A. §§33-34-1 to 33-34-13 (Michie 1982). Prior to the adoption of the Michie Company's Code revision on that date, the No-Fault Act was cited as *Ga. Code Ann.* §§56-3401b to 56-3416b. All citations of the No-Fault Act and its various sections in this Motion/Brief will be to the currently in force O.C.G.A. rather than to the *Ga. Code Ann.*

along with numerous other insurers, commenced declaratory judgment actions involving claims asserted under the *Jones* decision, and defended other such claims, all in an effort to obtain from the Georgia appellate courts, as well as the federal courts in Georgia, clarification of *Jones'* impact upon insurers' obligations under the No-Fault Act and a determination that the No-Fault Act, as interpreted and applied in *Jones*, violated insurers' constitutional rights.

Shortly thereafter, in *State Farm Fire & Casualty Co. v. Sweat*, 547 F.Supp. 233 (N.D. Ga. 1982), the federal district court, not being free to pass upon the merits of *Jones*, held that *Jones* could not be applied retroactively due to the lack of any fair warning to insurance companies regarding the "continuing offer" penalty provided by *Jones*. Subsequently, the Georgia Court of Appeals ruled in *Allstate Insurance Co. v. Shuman*, 163 Ga. App. 313, 293 S.E.2d 868 (1982), that a declaratory judgment action could be maintained respecting a *Jones*-type claim, given the mass confusion and reigning uncertainty which the *Jones* decision had yielded. In the midst of the *Jones*-created uproar, the Georgia General Assembly amended O.C.G.A. §33-34-5(b), to become effective on November 1, 1982, so as to delete the reference to "separate signatures." Then, in December of 1982, in *Atlanta Casualty Co. v. Flewellen*, 164 Ga. App. 885, 300 S.E.2d 166 (1982), the *en banc* Court of Appeals overruled *Jones* and held that one signature on no-fault insurance applications complied with the Georgia statute.

In March of 1983, the Georgia Supreme Court rendered decisions in the companion cases of *Flewellen v. Atlanta Casualty Co.* and *Van Dyke v. Allstate Insurance Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983) (hereinafter referred to as "*Flewellen*"), reversing the Court of Appeals' *Flewellen* decision, but declining to follow the *Jones* "continuing offer" theory. The Supreme Court held that the one signature on Atlanta Casualty's application was insufficient and that maximum optional PIP coverage was automatically included in the insurance policy if a proper rejection of same was not made through a correctly drawn application. Allstate's application was held to be sufficient to reject optional PIP coverages because it had a separate signature for collision and a separate signature for PIP coverage. Motions for reconsideration were denied and the Supreme Court's *Flewellen* decision became final on March 23, 1983.

As the Appellants' "Statement" reflects, their claim against Appellee had come on for trial in the interim, on June 28, 1982. The trial court tried the case under the presumption that *Jones* was controlling law and permitted the jury to consider the question of and assess against Appellee statutory penalties, attorneys' fees, and punitive damages on the basis of Appellee's failure to pay the Appellants' claim within thirty or sixty days of their original *Jones* demand. Appellee objected, contending, *inter alia*, that consideration by the jury of the question of statutory penalties and punitive damages should not have been allowed as a matter of law, given the uncertainty respecting the meaning of *Jones* and its

impact upon requests for retroactive increases in PIP coverage.

After the jury handed down a verdict against Appellee, including penalties, attorneys' fees, and punitive damages, on June 30, 1982, the Georgia Supreme Court issued its definitive decision in *Flewellen*. In fact, the Georgia Supreme Court's *Flewellen* decision was not rendered until after Appellee had filed its post-trial Motion for a New Trial, or, in the alternative, Judgment Notwithstanding the Verdict. As the Briefs filed in the Georgia Supreme Court reflect, and as oral argument before that Court confirmed, Appellee, deeming its obligations under Georgia's no-fault statute, insofar as the Georgia courts were concerned, to have been clarified by the Georgia Supreme Court's decision in *Flewellen*, tendered the optional no-fault benefits claimed by the Appellants within thirty days of the *Flewellen* decision. By this point in time, Appellee had filed its Notice of Appeal respecting the trial court's rulings on its various motions during the course of the trial, and the record on appeal in the Georgia Supreme Court had been transmitted. Thus, the issue of Appellee's tender of the optional no-fault PIP benefits required by *Flewellen* was never made a part of the trial court record in the case below purely as a result of the sequence of events respecting the Georgia Supreme Court's decision in *Flewellen*, the Georgia trial court's issuance of its Order on Appellee's post-trial motions, and the appeal of the rulings on those motions.

Finally, in the Georgia Supreme Court's decision in the case at hand, *Cotton States Mutual Insurance Co. v. McFather*, 251 Ga. 739, ____ S.E.2d ____ (1983), Appellee's interpretation of its obligations under the Georgia Supreme Court's *Flewellen* decision was confirmed, insofar as the Georgia courts were concerned, when the Court held that Appellee's failure to pay optional PIP benefits, in response to the *Jones*-type demand of the Appellants, until *Flewellen* was final on March 23, 1983, under the circumstances of the subject uncertainty as to its obligations, would not support an award of bad faith penalties and punitive damages. The *McFather* decision was followed by the Georgia Supreme Court in *Colwell v. Voyager Casualty Insurance Co.*, 251 Ga. 744, ____ S.E.2d ____ (1983), where the Court reversed that portion of the Georgia Court of Appeals' opinion which had allowed the pre-*Flewellen* failure to pay optional PIP benefits pursuant to a *Jones* demand to serve as a basis for penalties and punitive damages.

The Georgia Supreme Court remanded the instant case to the trial court for resolution of any factual dispute respecting Appellee's tender of the optional PIP benefits within thirty days of March 23, 1983, which tender they held would preclude imposition of penalties, attorneys' fees, and punitive damages under O.C.G.A. §33-34-6(b) and (c). 251 Ga. at 744.

Appellants contend in the appeal at bar that the Georgia Supreme Court's actions in applying Georgia's No-Fault Act and in remanding this case to the trial court for clarification of a factual issue which

the Court deemed relevant to imposition of a portion of the judgment violated Appellants' due process and equal protection rights under the United States Constitution.

ARGUMENT IN OPPOSITION TO APPELLANTS' APPEAL AND/OR PETITION FOR CERTIORARI[4]

Appellants' claims in this Court do not challenge the *validity* of a Georgia statute.[5] Instead, Appellants challenge the constitutionality of the manner in which the Georgia Supreme Court *applied* a Georgia statute, as well as the constitutionality of that Court's consideration of facts deemed pertinent in applying that statute, and the alleged lack of authority by the Court to take those actions. In essence, Appellants seek nothing more than to have this Court override the Georgia Supreme Court's interpretation and application of Georgia law.

---

[4] Appellants seek to appeal, under 28 U.S.C.A. §1257(2), the decision of the Georgia Supreme Court rendered below, but Appellants request this Court to consider their "Notice of Appeal" and "Jurisdictional Statement" as their Petition for Certiorari, "[i]n the event this Court does not find jurisdiction with respect to this Appeal." (Appellants' Juris. Statement, p. 2). Thus, while this pleading is denominated as "Appellee's Motion to Dismiss the Appeal," Appellee respectfully requests that the Court consider its pleading as Appellee's Brief in Opposition to the Petition for Certiorari, in the event that Appellants' Appeal is considered to be a Petition for Certiorari.

[5] Appellee does challenge the validity of the statute in its cross-appeal.

I. APPELLANTS' APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND THIS COURT IS THEREFORE WITHOUT JURISDICTION.

A. Appellants question the Georgia Supreme Court's *application* of a state statute rather than challenging the constitutional validity of that statute.

In attempting to invoke this Court's jurisdiction, Appellants claim that their "action for benefits, penalty, attorneys' fees and punitive damages draws in question the Georgia 'no-fault' insurance law, . . . as said statute was construed and applied by the Supreme Court of Georgia in the above-stated case, on the grounds that the construction and application of said State statute is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States." (Appellants' Juris. Statement, p. 3). The Appellants do *not* draw into question the constitutional *validity* of the state statute itself; indeed, Appellants' claim against Appellee is premised upon rights allegedly provided by that very statute. They contend further that that application deprived them of some property right. The property right, however, is contended to be the alleged right of Appellants to have left intact a judgment, which judgment was *subject to being and was appealed*. There is no "right" to avoid having a judgment modified on appeal.

Section 1257(2) of Title 28 of the United States Code does not provide for Supreme Court review by

appeal where the construction or application of a statute is challenged, rather than the actual validity of the statute itself:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> (2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C.A. §1257(2).

Review by appeal is unavailable in this Court where the appellant claims that a state court's misconstruction of a state statute renders it unconstitutional, although the appellant admits the state statute to be valid. In the early decision of *Commercial Bank of Cincinnati v. Eunice Buckingham's Executors*, 46 U.S. 317, 5 How. 317, 12 L.Ed. 169 (1847), respecting the application of a state banking statute to a particular bank, the Court explains the fallacy of such an attempted appeal:

> [T]he allegation of the plaintiffs' counsel is, that the statute of 1824 was not intended by the legislature to apply to their charter, and that the court erred in their construction of it; and therefore made it unconstitutional by their misconstruction. A most strange conclusion from such premises.

> But grant that the decision of that court could have this effect; it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not where an act admitted to be valid has been misconstrued by the court . . . . It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

5 How. at 342-343.

More recently, in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), that rule was restated when the Court explained that an objection to a state supreme court's application of state law does not raise a federal question appropriate for review by the United States Supreme Court. 447 U.S. at pp. 259-260, fn. 6.

Appellants' attempted appeal in the case at hand complains of nothing more than the Georgia Supreme Court's application of a state statute rather than of the constitutional validity of that statute, and this Court therefore cannot entertain jurisdiction of this appeal.

B. The actions of state courts in deciding questions of state law are not subject to review by this Court.

Appellants complain that their federal constitutional rights to due process and equal protection have been egregiously violated by the Georgia Supreme Court's actions in remanding the case to the trial court for resolution of a factual issue deemed pertinent. Aside from the fact that the Georgia Supreme Court merely utilized the commonplace and unremarkable procedure of remanding a case to the trial court for resolution of a factual issue which cannot be resolved based on the record on appeal (hardly a denial of due process since the Georgia Supreme Court merely seeks to have a factual issue resolved by the trial court, where, presumably, due process will be afforded to Appellants), the authorities confirm that the practices of state courts in deciding questions of state law are not subject to review by the Supreme Court.

In *Bethell v. Demaret*, 77 U.S. 537, 10 Wall. 537, 19 L.Ed. 1007 (1871), the Court held that a decision of the Louisiana Supreme Court respecting the validity of promissory notes given for the loan of Confederate currency did not present a federal question even though the petitioner in the United States Supreme Court claimed a constitutional violation of the impairment of contracts clause. The petitioner did not challenge the validity of a state statute, and the Court indicated, ". . . the authority conferred on a court to hear and determine cases in a State, is

not the kind of authority referred to in the 25th section [of the Judiciary Act], otherwise every judgment of the Supreme Court of a State would be reexaminable under the section . . . ." 10 Wall. at 540.

The decision of *Commercial Bank of Cincinnati v. Eunice Buckingham's Executors*, 46 U.S. 317, 5 How. 317, 12 L.Ed. 169 (1847), also admonished against the United States Supreme Court's assumption of jurisdiction over cases decided by the highest courts of the several States on the pretense that the *judgments* of those courts violated federal constitutional rights.

In addition, this Court noted in *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 596, 33 S.Ct. 605, 57 L.Ed. 982 (1913), that the Virginia Supreme Court's application of state law in determining condemnation rights did not justify the exercise of jurisdiction by the United States Supreme Court. "The claim that in thus holding and deciding the court below denied to the plaintiff in error due process of law under the Fourteenth Amendment is neither real nor substantial, but so entirely without merit as to justify this Court in refusing to take jurisdiction." 228 U.S. at 603.

In *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112, 29 S.Ct. 227, 53 L.Ed. 431 (1909), the plaintiff in error claimed that its due process and equal protection rights had been violated because of the *manner* in which the state appellate court acted in appointing a receiver, thereby depriving the plaintiff of its prop-

erty. The Court held that the state court's actions were insufficient to present a substantial federal question, and stated:

> The practice of the state courts in acting upon matters within their jurisdiction is left for the States and their courts administering their laws to determine, and if the court saw fit to act upon the testimony already heard and the conviction already had [in a separate proceeding] of the violation of the anti-trust laws of the State, there is nothing in the Federal Constitution which prevents it from so doing. Nor does the time or manner in which the state court saw fit to approve the receiver's bond present any question under the Fourteenth Amendment.

212 U.S. at 118.

This Court's refusal to accord federal constitutional significance to a state appellate court's consideration of matters not contained in the trial record is reflected in *Lear, Inc. v. Adkins*, 395 U.S. 653, 89 S.Ct. 1902, 23 L.Ed. 610 (1969), where the plaintiff in error complained of the state court's reliance on an agreement which was not part of the trial court record. This Court noted, "Lear argues that this original agreement was not submitted in evidence at trial and so should not be considered a part of the record on appeal. The California Supreme Court, however, treated the agreement as an important part of the record before it, 67 Cal.2d, at 906, 436 P.2d, at 335; and so we are free to refer to it." 395 U.S. at 657 fn. 1.

This Court cannot, and should not, undertake to review by appeal the compliants of plaintiffs in error respecting the manner in which the Supreme Courts of the various States consider evidence in the records before them.

Appellants' claims that the Georgia Supreme Court somehow violated their due process rights in remanding this case for further consideration by the trial court is patently without merit, and curious, since the procedural tool of remand is widely used and accepted and, especially in the case at hand, is employed for the very purpose of developing facts not contained within the record so that the due process rights of the parties to a full and fair hearing on issues deemed important by the state court are preserved. Appellants cannot seriously contend that this remand procedure deprives them of rights, since the remand relates to the disposition of a judgment which was the subject of the appeal.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED AND WAS NOT EXPRESSLY PASSED ON BY THE GEORGIA SUPREME COURT.

Even though *Appellee* argued consistently in the trial court below, as well as in the Georgia Supreme Court, that the statutory penalty, attorneys' fees, and punitive damages of O.C.G.A. §33-34-6 could not be applied as a matter of law in *Jones*-type claims, Appellants never once raised, prior to the Georgia Supreme Court's decision in this case, the

constitutional arguments they now seek to pursue. Indeed, Appellants did not even raise these purported constitutional issues in their first Motion for Rehearing which was filed on December 15, 1983. The only reference by Appellants in that first Motion for Rehearing to constitutional considerations was that the Georgia Supreme Court's decision in this case "raises substantial questions as to state and federal due process and state and federal equal protection." Only in their second Motion for Reconsideration, filed on December 31, 1983, did Appellants raise specific arguments with respect to the purported unconstitutionality of the Georgia Supreme Court's decision in this case.

Thus, Appellants did not raise their constitutional claims at the first opportunity, and, in any event, the Georgia Supreme Court Opinion did not supply any new and unexpected constitutional grounds, since the Georgia Supreme Court merely adopted some of the arguments made by Appellee consistently throughout the litigation respecting the unlawfulness of subjecting insurers to statutory penalties, attorneys' fees, and punitive damages in *Jones*-type claims prior to clarification of the law respecting no-fault insurance applications by the Georgia appellate courts.

Generally, neither a petition for rehearing, nor a petition for a writ of error in the state court after judgment, nor an assignment of error in the Supreme court, can cure the failure of the record to show that a federal question was raised by the appellant and decided against the appellant, so that

jurisdiction can be conferred on the Supreme Court of a writ of error to the state court. *Harding v. Illinois*, 196 U.S. 78, 84, 25 S.Ct. 176, 49 L.Ed. 394 (1904). The Appellants in the case at hand are subject to this general rule, because they failed to raise their federal claims at the first opportunity and because, in any event, the grounds of the Georgia Supreme Court's decision below did not supply any new or unexpected basis for a claim by Appellants of a denial of federal rights. *See Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

Furthermore, this Court has recognized that an "attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal questions, cannot avail . . .", and no substantial federal question is presented in such a case. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 112, 118, 29 S.Ct. 227, 53 L.Ed. 431 (1909). Appellants admit that they did not raise their purported constitutional claims until the second Motion for Rehearing, and Appendix C to Appellants' "Jurisdictional Statement" reflects that Appellants' second Motion for Rehearing was denied without an opinion passing on the purported federal questions.

Hence, the federal questions sought by Appellants to be reviewed herein were neither timely nor properly raised and were not expressly passed on by the Georgia Supreme Court, and this Court should therefore dismiss Appellants' appeal.

III. THE CASE HAS BEEN REMANDED FOR FURTHER PROCEEDINGS IN THE GEORGIA TRIAL COURT AND THE FINALITY REQUIREMENT OF 28 U.S.C.A. §1257 IS THEREFORE LACKING.

The finality requirement of 28 U.S.C.A. §1257 applies to United States Supreme Court review by way of appeal and by way of granting a writ of certiorari. Where a case is remanded and clearly contemplates further proceedings in the trial court to resolve disputed factual issues, an attempted appeal to the United States Supreme Court must be dismissed because of the absence of a final judgment. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981). This Court should not undertake to review an opinion of the Georgia Supreme Court where that very opinion provides that the case be remanded to the trial court for further proceedings to resolve disputed factual issues.

CONCLUSION

This Court is without jurisdiction, in that no substantial federal question is presented; the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on by the Georgia Supreme Court; and the judgment sought to be reviewed is not final. The Motion to Dismiss the Appeal should be granted or, in the al-

ternative, Appellants' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATEMENT RESPECTING FILING

I, G. Conley Ingram, counsel of record for the Appellee herein and a member of the Bar of the Supreme Court of the United States, hereby state under oath that on the 17th day of April, 1984, within the time permitted by the Rules of the United States Supreme Court, I caused to be deposited in the United States Post Office located at Cumberland Mall, Atlanta, Georgia, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, forty (40) copies of the within and foregoing Appellee's Motion to Dismiss.

_____

G. CONLEY INGRAM

Sworn to and subscribed before me this ____ day of _____, 1984.

_____

Notary Public

AFFIDAVIT OF SERVICE

I, Vickie Cheek Lyall, hereby state under oath that I am of Counsel for Appellee, Cotton States Mutual Insurance Company, and that I have served three copies of the within and foregoing Appellee's Motion to Dismiss the Appeal by mailing same, properly addressed, first-class postage prepaid, to Albert W. Stubbs, of Hatcher, Stubbs, Land, Hollis & Rothchild, Post Office Box 2707, Columbus, Georgia 31993, Counsel of Record for Appellants.

This 17th day of April, 1984.

_____

VICKIE CHEEK LYALL

Sworn to and subscribed before me this ____ day of _____, 1984.

_____

Notary Public

Office - Supreme Court, U.S
FILED
MAY 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of CARL MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Administrators of the Estate of ANN B. MCFATHER; BEN MCFATHER and FRANK MCFATHER, as Co-Guardians of DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER and FRANK MCFATHER, as next friends for DANIEL MCFATHER, JOHN MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER; and BEN MCFATHER, FRANK MCFATHER, PENNY MCFATHER, JILL MCFATHER, JEFF MCFATHER, DANIEL MCFATHER, LORI ANN MCFATHER, ROBERT EDWARD MCFATHER, SUSAN MCFATHER, PAUL MCFATHER and TIMOTHY LYN MCFATHER,

Appellants,

v.

COTTON STATES MUTUAL INSURANCE COMPANY,

Appellee.

RESPONSE TO MOTION TO DISMISS APPEAL

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RESPONSE OF APPELLANTS TO APPELLEE'S MOTION TO DISMISS

In our response to the Appellee's arguments directed toward dismissal of the appeal, we will sometimes refer to Appellle as "Cotton States" and sometimes refer to Appellants as "the McFathers".

A great deal of Appellee's Motion to Dismiss comes close to being an argument on the merits (pp. 1-7). We respond to that portion of its motion only by pointing out that on p. 3 of its motion to dismiss, Appellee cites State Farm Fire & Casualty Co. v. Sweat, 547 F. Supp. 233 (N.D. Ga. 1982), but other decisions of judges of the Northern District of Georgia were to the contrary, namely:

Cotton States Mutual Insurance Co. v. J. O. Anderson, Jr., etal., (N.D. of Ga. 1983)

Taylor v. Hartford Cas. Ins. Co., 545 F. Supp. 282 (S.D. Ga., 1982)

State Farm Mutual v. Bates, 542 F. Supp. 807 (N.D., Ga., 1982).

I. (a) APPELLANTS HAVE CHALLENGED THE CONSTITUTIONAL VALIDITY OF THE STATUTE

Cotton States questions our constitutional attacks on several grounds: "The appellants do not draw into question the constitutional validity of the state statute itself..." (Motion, p. 8) These quoted words make up a statement which is not true. Appellants challenged the constitutional validity of O.C.G.A. 33-34-6, former Ga. Code Sec. 56-3406(b), as erroneously construed by the Georgia Supreme Court and erroneously applied by that Court to deprive the plaintiffs of their protected and vested rights in their judgment.
(Jurisdictional Statement of Appelllants, p. 3)

Cotton States, in spite of a great deal of bold language, cites only two cases in this section of its motion. Agins v. City of Tiburon, 447 U.S. 255, at pp. 259-260, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), is not in point. "The question in this case is whether a municipal zoning ordinance took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments." (pp. 257-258). In note 6, cited by Cotton States, the Court said only: "In this case, the State

Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under review."

The other case cited by Cotton States in this section is Commercial Bank of Cincinnati v. Eunice Buckingham's Executors, 46 U.S. 317, 5 How. 317, 12 L.Ed. 169 (1847). This Court has distinguished that case more effectively than we could possibly do:

> "There (Commercial Bank, supra) both the prior and subsequent statutes were admitted to be valid under any construction of them. 'And therefore no construction placed by the state court on either of them could draw in question its validity, as being repugnant to the Constitution of the United States or any Act of Congress.'" Baltimore and Potomac R. Co. v. Hopkins, 130 U.S. 210, at p. 210, 32 L.Ed. 908, 9 S.Ct. 503 (1889).

The Supreme Court of the United States, in yet another case, has distinguished The Commercial Bank, supra, and also rejected Appellee's argument that "construction" of a statute can not raise a question of constitutional validity:

> "The case of The Com. Bank v. Buchingham's Executors, 5 How. 317, does not conflict with this view, because that was a case in which the prior and the subsequent statutes were both admitted to be valid under any construction of them, and therefore no construction placed by the state court on either of them could draw in question its validity, as being repugnant to the Constitution of the United States or any Act of Congress." Bridge Proprietors v. Hoboken L. and I. Co., 68 U.S. at p. 143, I Wall 116-155, 17 L.Ed. 571, at p. 576 (1864). (Emphasis added)

As pointed out in our jurisdictional statement (p. 10), the Georgia Supreme Court denied due process of law under the Fourteenth Amendment when it "construed" and "applied" the Georgia "no-fault" law 30/60 day penalty, attorneys' fees, punitive damages section to run or be triggered only from a time when the Georgia Supreme Court made the law clear, when the triggering event by statute really was the time when the McFathers filed reasonable proof of their claims with Cotton States.

In this connection, see:

In Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284 (1), 91 S.Ct. 1780 (1971), this Court said at page 289:

"[1] The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently

[403 US 18]

Claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal."

See also:

Missouri Ex Rel Missouri Ins. Co. v. Gehner, 281 U.S. 313, 74 L.Ed. 870 (2), at p. 876, 50 S.Ct. 326 (1930) (Construe)

Japan Line Ltd. v. County of Los Angeles, 414 U.S. 434 (4), 60 L.Ed.2d 336, at p. 343, 99 S.Ct. 1813 (1979) (Apply)

Cardindale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, at p. 400, 89 S.Ct. 1162 (1969) (Construe and apply)

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Herndon v. Georgia, 295 U.S. 441, 79 L.Ed. 1530 (5), at p. 1533, 55 S.Ct. 794 (1935) ("Construed")

In a case cited by Appellee in its motion to dismiss (p. 16), this Court said:

"Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment [680] would be obvious. Ettor v. Tacoma, 228 U.S. 148, 57 L.Ed. 773, 33 Sup. Ct. Rep. 428. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First Nat. Bank v. Weld County, 264 U.S. 450 68 L.Ed. 784, 44 Sup. Ct. Rep. 385) state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative,

executive or administrative, branch of government. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107, at p. 1113, 50 S.Ct. 451 (1930)

I. (b) THE ACTIONS OF STATE COURTS IN THE CONSTRUCTION OF STATUTES ARE SUBJECT TO REVIEW BY THIS COURT.

Appellee euphemistically views the activity below as "the fact that the Georgia Supreme Court merely utilized the commonplace and unremarkable procedure of remanding a case to the trial court for resolution of a factual issue which cannot be resolved based on the record on appeal...." (Motion to dismiss, p. 11)

Appellee responds to our showing of a denial of due process by referring to the remand to the trial court "... where, presumably, due process will be afforded to pellants. ..." (Motion p. 11). If the trial court does not afford to the McFathers any more due process than the Georgia Supreme Court did, they will indeed be in bad shape.

Appellee's citations need to be examined more closely than Appellee's characterization of them.

Bethell v. Demaret, 77 U.S. 537, 10 Wall 537, 19 L.Ed. 1007 (1871), was simply a contest on a matter of fact. No constitution, statute or treaty was cited relating to validity of the contract. On page 1008, the Court said:

> "As no federal question appears in the record, the motion to dismiss must be granted."

Commercial Bank, supra, is cited again on page 12 of the motion. As we have showed above, that case is easily distinguished in Baltimore and Potomac R. Co., supra, and in Bridge Proprietors, supra.

In Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 33 S.Ct. 605, 57 L.E. 982 (1913), this Court pointed out that:

> "The claim...the court below denied to the plaintiffs in error due process of law under the 14th Amendment is neither real nor substantial, but so entirely without merit as to justify this court in refusing to take jurisdiction." (p. 984) (Emphasis added)

Appellee failed to demonstrate the significance of

Waters-Pierce Oil Co. v. Texas, 212 U.S. 112, 29 S.Ct. 227, 53 L.Ed. 431 (1909) (Motion, pp. 12-13). However, in the second line of their quotation, the distinguishing word does appear: "The practice of the state courts in acting upon matters within their jurisdiction..."(emphasis added) (Motion, p. 13).

Appellee, in a cavalier approach, refers (Motion, p. 14) to our contention that the Georgia Supreme Court "somehow" violated due process as "patently without merit" and also as "curious" because, they say, "the procedural tool of remand is widely used and accepted." They then suggest that "the very purpose" of this remand is to preserve "the due process rights of the parties to a full and fair hearing."

This is very elegant language indeed, but where is the law and where are the facts? The striking thing about Appellee's responses to the jurisdictional statement of Appellants is that Appellee manages to avoid facing any issue in the case. It's cross-appeal is no different.

Appellee misapplies Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932), saying the Georgia Supreme Court "did not supply any new or unexpected basis" for our claim "of a denial of federal rights" (motion, p. 16). That is precisely what it did do. It turned around and changed the rule of O.C.G.A. 33-34-6 as contrued in Flewellen v. Atlanta Casualty Co., 250 Ga. 709, 300 S.E.2d 673 (1983)

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (5) (1930), (Appellee's motion, p. 16) actually supports Appellants' position, not Appellee's. It demonstrates clearly that a motion for rehearing is timely where the state court adopts a new construction of a statute:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief

> because of the newly found powers of the commission, the court transgressed the due [678] process clause of the 14th Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity....The petition was denied without opinion....We are of opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law - using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

The opinion of the Court in Waters-Pierce Oil Co. v. Texas 212 U.S. 112, 118, 29 S.Ct. 227, 53 L.Ed. 1107 (1930), is somewhat misleading. The quotation (Appellee's motion, p. 16) is correct, but the emphasis should not be on "without an opinion", but should rather be on "without an opinion passing on Federal questions." (Emphasis added)

II. (a) THE FEDERAL QUESTION WAS RAISED IN A MANNER TIMELY AND PROPER.

Appellee states (Motion, p. 14):

> "Appellants never once raised, prior to the Georgia Supreme Court decision in this case, the constitutional arguments they now seek to pursue."

It must be obvious to the reader of the papers in this case that only a clairvoyant could have done other wise. Our constitutional arguments were not "in this case" proir to the Georgia Supreme Court decision. In fact, our constitutional arguments are based on what the Georgia Supreme Court itself did to us. We pointed out in our jurisdictional statement (pp. 7-8) that the Georgia Supreme Court "without sustaining any challenged ruling of the trial court", nevertheless, turned the case around and sent it back to the trial court. Remand was a remedy Cotton States itself had not even requested.

This Court has held that "...the federal claim is timely if the ruling of the highest court could not have

been anticipated and a petition for rehearing presented the first opportunity for raising it."

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 77L.Ed. 360, 53 S.Ct. 145 (1932)

Brinkerhoff-Faris Trust & Sav. Co. Hill, 281 U.S. 673, 680,74 L.Ed. 1107, 113, 50 S.Ct. 451

Cardindale v. Louisiana, 394 U.S. 437, 22 L.Ed.(2) 398, 89 S.Ct. 1162

The motion for rehearing was Appellants' first opportunity.

Equally as unfair, impractical and contrary to law is the argument that our assertion of the federal question was not timely because it was not urged in our first motion for rehearing, but rather in our second motion for rehearing, that is our motion for reconsideration. Cotton States cites no authority to support that proposition. It is clear that the law is otherwise. Fleming v. Fleming, 68 L.Ed. 547, 264 U.S. 29, 44 S.Ct. 246 (1924). The rationale of the appellate rule (and it appears to be universal) requiring a point to be raised in the court below is to give the court below a fair chance to decide the question without being "sand bagged". This Court has held that the requirement is satisfied if the court below had an opportunity to consider the question. Cardindale, supra.

II. (b) THE GEORGIA SUPREME COURT COULD NOT FAIL TO CONSIDER THE QUESTION OF ITS OWN JURISDICTION AND THE WORD "DENIED" IS ENOUGH TO SHOW THAT IT DID.

In addition to the fact that the Georgia Supreme Court could not have "denied our motion for reconsideration (raising questions of its jurisdiction) without passing on the substantial federal questions raised itn that motion, the United States Supreme Court has held many times that, in showing that the state court had passed on a federal question, it is not necessary to show that the state court opinion even referred to the federal question:

"...it was held in this court that while the surpeme court of Illinois did not in its opinion expressly refer to the Federal constitutional rights asserted, the same was necessarily included in the judgement of the court and

therefore the case was reviewable here." Harding v. Illinois, 196 U.S. 78, 49 L.Ed. 394, at p. 397, 25 S.Ct. 176 (1904) (Emphasis added)

"We think notwithstanding the Dauphin County court, in its opinion, failed to discuss this matter, as the Supreme Court of Pennsylvania points out, the question was sharply presented to that court and decided by it, and [123] that the rights of the appellant were specifically preserved and pressed at every stage of the proceeding. We find, therefore that the question is here for decision." Schuylkill T. Co. v. Pennsylvania, 296 U.S. 113, 80 L.Ed. 91 (5), at p. 98, 56 S.Ct. 31 (Emphasis added)

It is enough to show that the federal claim was set up and that it was "denied", the very word used by the Supreme Court of Georgia.

> "It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law...
>
> "In such case if the court below denied the right claimed, it would be enough." Dewey v. Des Moines, 173 U.S. 193, 43 L.Ed. 665, at p. 667, 19 S.Ct. 379 (1899) (Emphasis added)
>
> "'The true and rational rule' this court said in Bridge Proprietors v. Hoboken Land & Improv. Co., 1 Wall. 143 [17:576], 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who bring the writ of error and that the right thus claimed by him was denied.' In Roby v. Colehour, 146, U.S. 159 [36:922], it was said that 'our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear form the record of the case, either that the right, of set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient. Powell v.

Brunswick County, 150 U.S. 440 [37:1137]; Sayward v. Denny, 158 U.S. 180 [39:941]; Chicago, Burlington & Q. R. R. Co. v. Chicago, 166 U.S. 226 [41:979]." Green Bay & M. Canal Co. v. Patten Paper Co., 172 U.S. 58, 43 L.Ed. 364, at pp. 368-369.

Courts can not waive jurisdiction, can not ignore it. It is the duty of every court, even on its own motion, to examine its jurisdiction. S. E. Underwriters Assn. v. Cravey, 216 Ga. 599, 600 (1961), 118 SE2d 471. Williams v. State, 217 Ga. 312, 122 SE2d 229.

III. THE CASE IS APPEALABLE UNDER COX BROADCASTING CORP. v. COHN.

In spite of the illegal action of the Georgia Supreme Court in attempting to remand this jury trial case to a judge for fact finding to validate the erroneous ruling of the Georgia Supreme Court ruling is appealable for review at this time. We submit that this Court has clearly established the rules in Cox Broadcasting Corp. v. Cohn, 43 L.Ed. 2d 328, 420 U.S. 469, 95 S.Ct. 1029 (1975): The old "face of the judgment" test no longer determines what is final. See Moore's Federal Practice, 2nd Ed., ¶508.01(10), pp. 8-34. In Cox, supra, this Court established four finality categories where:

1. The federal issue is conclusive or the outcome of any further proceeding in the state court is preordained.
2. The federal issue, as determined by the highest state court, will survive any possible outcome of future state court proceedings and require resolution by the Supreme Court.
3. The federal issue has been finally decided, but later review will be impossible regardless of the outcome of the subsequent state court proceedings.
4. Where the federal issue has been finally decided in the state court.

CERTIFICATE OF SERVICE

I certify that I am of Counsel for Ben McFather, et al., Appellants, and that I have served a copy of the within and foregoing Response to Motion to Dismiss Appeal by mailing a copy of the same, properly addressed, postage prepaid, to J. Franklin Edenfield, Esq., Spivey, Carlton & Edenfield, P. O. Box 309, Swainsboro, Georgia, 30401, and G. Conley Ingram, Esq., Alston & Bird, 1200 C & S National Bank Building, 35 Broad Street, Atlanta, Georgia, 30335, the attorneys for Appellee, Cotton States Mutual Insurance Company.

This _____day of April, 1984.

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Cousel of Record for Ben McFather, et. al., Appellants

Respectfully submitted,

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PROOF OF MAILING -- AFFIDAVIT

I, Albert W. Stubbs, one of the attorneys for Ben McFather, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 30 day of April, 1984, I deposited in a United States post office located at Columbus, Georgia, with first-class postage prepaid, and properly addressed to the Clerk of Supreme Court of the United States, within the time allowed for filing, the foregoing Response of Appellants to Appellee's Motion to Dismiss.

_____

Albert W. Stubbs

Subscribed and sworn to before me,

at Columbus, Georgia, this 30th

day of April, 1984:

_____

END OF DOCKET